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TRANSCRIPT OF RECORD

(Pages 4807 to 5221)

Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER AND POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, PETITIONERS,

vs.

FEDERAL POWER COMMISSION ET AL.

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER,

vs.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR CERTIORARI FILED NOVEMBER 16, 1951

CERTIORARI GRANTED FEBRUARY 4, 1952

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10236.

PENNSYLVANIA WATER & POWER COMPANY, A CORPORATION, AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, A CORPORATION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR REVIEW.

(Filed April 22, 1949.)

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

PENNSYLVANIA WATER & POWER COMPANY (Penn Water), Petitioner, being aggrieved on its own behalf by an "Order Reducing Rates", issued by the Federal Power Commission (the Commission) January 5, 1949, being so aggrieved by an order issued February 28, 1949, denying rehearing of and amending the order issued January 5, 1949, and amending an order issued January 31, 1949, and being so aggrieved by an order issued March 17, 1949, denying rehearing of the order issued February 28, 1949, all of which orders were issued by the Commission in its Docket No. IT-5915; Penn Water being separately and independently so aggrieved by such orders as the owner of one-half of the Class B voting stock of Safe Harbor Water Power Corporation (Safe Harbor), said Safe Harbor being unable to intervene in this proceeding to protect its interests because of a deadlock in its Board of Directors, as set forth in Petitioners' Application for Rehearing of the Com-

mission's order of January 5, 1949, to be hereinafter referred to; and Penn Water also being separately and independently so aggrieved by such orders as agent for and on behalf of Safe Harbor under the provisions of certain contracts for joint services rendered to Pennsylvania Power & Light Company (PP & L) and Philadelphia Electric Company (Philadelphia Company); and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND (Transmission Company), Petitioner, also being aggrieved by such orders; hereby file this their Petition for Review under Section 313 (b) of the Federal Power Act (16 U. S. C. § 825-l (b); 49 Stat. 860), and pursuant to Rule 38 of this Court, to review, hold unlawful, and set aside such orders of January 5, 1949, February 28, 1949, and March 17, 1949, certain findings and conclusions incorporated therein, and certain preliminary, procedural, and intermediate orders, actions and rulings of the Commission in its Docket No. IT-5915, in accordance with the provisions of Section 10 of the Administrative Procedure Act (5 U. S. C. § 1009; 60 Stat. 243); and Petitioners represent and show to the Court:

The Nature of the Proceedings as to Which Review Is Sought.

I. Petitioner, Penn Water, is a corporation organized under the laws of the Commonwealth of Pennsylvania, and owns and operates a hydro-electric generating plant and a steam-electric generating plant on the Susquehanna River at Holtwood, Pennsylvania; and it also owns and operates electric transmission lines wholly within Pennsylvania radiating therefrom. It generates, transmits, distributes, and renders hydro and steam electric power and other services for use in public service. Construction of Penn Water's hydro-electric generating plant began in 1905 and commercial operation began in 1911. On November 3, 1939, the Commission found and required that Penn Water should apply for and obtain a license from the Commission for

its then existing hydro-electric project under the provisions of Part I of the Federal Power Act (16 U. S. C. §§ 791a *et seq.;* 41 Stat. 1063; 46 Stat. 797; 49 Stat. 838). After application the Commission ordered a license issued on November 23, 1943, but such order was stayed by the Commission on application for rehearing by Penn Water with respect to certain of the conditions imposed by the Commission.

II. Petitioner, Transmission Company, is a corporation organized under the laws of the State of Maryland, a wholly owned subsidiary of Penn Water, and owns transmission lines wholly within Maryland, some of which are connected to the transmission lines of Penn Water at the Pennsylvania-Maryland State line.

III. Safe Harbor is a Pennsylvania corporation, and owns and operates a hydro-electric generating plant, on the Susquehanna River in Pennsylvania, a short distance above the Holtwood Plant of Penn Water. Its hydro-electric plant is connected to the Holtwood plant by means of the transmission lines of Penn Water; and all of the output generated at the Safe Harbor plant is received on and transmitted by the transmission lines of Penn Water. Penn Water and Consolidated Gas Electric Light & Power Company of Baltimore (Baltimore Company) each owns one-half of the voting stock of Safe Harbor; and membership on the Safe Harbor Board of Directors is divided evenly between nominees of each of the two stockholders.

IV. Penn Water and Safe Harbor have entered into a number of contracts for the purchase or exchange of energy, for the rendering of transmission and other services, and for the disposition of the electrical resources available at their respective plants.

V. Penn Water, Safe Harbor, and Baltimore Company, with a specified participation by Potomac Electric Power Company (PEPCO), are jointly obligated under a contract with The Pennsylvania Railroad Company (Railroad) for

the furnishing of services to the Railroad for electrified railroad use in specified areas in Pennsylvania and Maryland. The revenues are collected under this contract by Baltimore Company as agent for the other suppliers, and divided between Penn Water and Baltimore Company by a separate agreement.

VI. Penn Water and Safe Harbor are jointly obligated under a contract with PP & L for the furnishing of services to PP & L in its Lancaster and Harrisburg, Pennsylvania, territories. Penn Water and Safe Harbor are also jointly obligated under a contract with Philadelphia Company for the furnishing of services to the latter in its Coatesville, Pennsylvania territory. Revenues from these two contracts are collected by Penn Water as agent for Safe Harbor. Safe Harbor receives its revenues for its services rendered under these contracts, as well as the services it renders under the Railroad contract and all of its other contracts, under a three-party contract between Penn Water, Baltimore Company, and Safe Harbor, hereinafter referred to.

VII. Penn Water furnishes services to Metropolitan Edison Company (Metropolitan Company) under a contract for the supply of such services to Metropolitan Company in a specified area in Pennsylvania. Penn Water, and in some cases Safe Harbor, are parties to other ancillary contracts providing for interchange of energy and coordination of services and facilities between the parties.

VIII. Under an agreement dated December 31, 1927, as amended on December 27, 1928, June 1, 1931, and September 29, 1939, Penn Water agreed to furnish certain services including the use by Baltimore Company of certain specified facilities, and agreed to supply Baltimore Company all electrical capacity and energy available to Penn Water at its Holtwood plant and from Safe Harbor (under the three-party contract next referred to), not otherwise disposed of under other contracts. Baltimore

Company agreed to pay specified amounts in accordance with a formula set forth therein, without regard to the amount of electrical services received. Baltimore Company also agreed to supply, at Penn Water's request, steam-generated electric energy under specified conditions and at a specified cost rate, plus ten per cent, applied to the daily net amount of backfeed supplied.

IX. On June 1, 1931, the same date as a substantial amendment of the foregoing two-party agreement between Penn Water and Baltimore Company, and when all three parties were affiliated under common control, Safe Harbor, Penn Water, and Baltimore Company also entered into a three-party contract. This three-party contract, as supplemented by amendments dated August 1, 1932, and November 22, 1939, provided for the payment to Safe Harbor by Penn Water and Baltimore Company, in specified proportions, of all costs of Safe Harbor, plus a specified return, less revenues received from others, without regard to the amount of power actually furnished. The contract provided for the entitlement by Penn Water and Baltimore Company, in specified proportions, to all of the capacity and daily energy available from the Safe Harbor plant, after deducting the capacity and energy required for the performance of the duties or obligations to serve imposed on Safe Harbor by its charter or otherwise by law. Safe Harbor, with the written consent of Baltimore Company and Penn Water, obligated itself to render services under the contracts with the Railroad, PP & L, and Philadelphia Company. As a part of the provisions of the three-party contract Penn Water agreed to construct transmission facilities between Safe Harbor and Baltimore Company, and to transmit under certain conditions and limitations any energy sold by Safe Harbor to Baltimore Company.

X. By order dated September 1, 1944, the Commission issued and instituted in its Docket No. IT-5915 a general order of investigation to determine whether any rates, charges, classifications, rules, regulations, practices, or con-

tracts of Penn Water, subject to the jurisdiction of the Commission, are unjust, unreasonable, unduly discriminatory, or preferential. There was no specification of which of Penn Water's rates, charges, etc., were subject to the jurisdiction of the Commission; nor was there any specification of the issues with respect to any of its rates, charges, etc. On the same date, in a separate Docket No. IT-5914, the Commission instituted a similar general investigation with respect to Safe Harbor. By order dated October 3, 1944, the proceeding in Docket No. IT-5915 was enlarged to include Transmission Company as a respondent. The Pennsylvania Public Utility Commission (Pennsylvania Commission), the Public Service Commission of Maryland (Maryland Commission), and Baltimore Company were permitted to intervene in Docket No. IT-5915. Prior to commencement of hearings Penn Water filed a Petition with the Commission requesting dismissal of the proceeding or in any event specification of the issues. This Petition was denied by order of the Commission dated April 5, 1946. Hearings began on April 15, 1946, and were closed on July 16, 1947. Copies of the said Commission orders of September 1, 1944, October 3, 1944, and April 5, 1946, are attached hereto and made a part hereof as Exhibits A, B, and C, respectively.

XI. By its order issued November 4, 1946, in its Docket No. IT-5914, the Commission required Safe Harbor to reduce substantially its revenues received from Penn Water and Baltimore Company under the three-party contract between them. The validity of that order of the Commission is now the subject of a petition for review pending before the United States Court of Appeals for the Third Circuit (*Safe Harbor Water Power Corp. v. Federal Power Commission*, No. 9345).

XII. By two orders dated September 27, 1948, the Pennsylvania Commission, in an investigation in its Docket No. 14028, instituted on December 5, 1944, fixed temporary rates and charges for the joint intrastate services of Penn

Water and Safe Harbor to PP & L, Philadelphia Company, and the Railroad, and for the intrastate services of Penn Water to Metropolitan Company. Baltimore Company intervened in that proceeding as a stockholder of Safe Harbor. The Pennsylvania Commission found that Safe Harbor and Penn Water operated an integrated and coordinated system in rendering intrastate services to their Pennsylvania customers, and that its jurisdiction to regulate so much of such intrastate services was unaffected by any proceedings or orders of the Federal Power Commission, or any other regulatory authority, properly limited to interstate services. Copies of such Pennsylvania Commission orders are attached as Exhibits to Petitioners' Application for Rehearing of the Commission's order of January 5, 1949, to be hereinafter referred to. The orders of the Pennsylvania Commission are the subject of a complaint by Baltimore Company now pending before the United States District Court for the Middle District of Pennsylvania. (*Consolidated Gas Electric Light & Power Company of Baltimore v. Pennsylvania Public Utility Commission, et al.*, Civil Action No. 3274).

XIII. In December, 1948, in litigation instituted sometime prior thereto before the United States District Court for the District of Maryland (*Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Company of Baltimore*, Civil Action No. 4179), Penn Water filed an amended complaint requesting a declaratory order declaring the two-party contract between Penn Water and Baltimore Company null, void and unenforceable as *ultra vires*, contrary to public policy, and as constituting an agreement in unreasonable restraint of trade, and unreasonably restricting competition in the generation and sale of electrical services, and unreasonably limiting the output of electrical energy, contrary to the laws of the United States, Pennsylvania, and Maryland. In this connection Baltimore Company has refused to permit expansion of Penn Water's facilities necessary for adequate service to

its customers, has attempted to compel termination of the services of Penn Water and Safe Harbor to their Pennsylvania customers, and has otherwise interfered with the rendering of adequate service by Penn Water and Safe Harbor to their customers. The contract was terminated by Penn Water by notice dated December 20, 1948, for the foregoing reasons and because of material breaches of the terms of the contract. Such litigation is now pending in the District Court.

XIV. By its order issued January 5, 1949, and accompanying Opinion No. 173, in its Docket No. IT-5915, the Federal Power Commission, asserted jurisdiction to regulate the revenues derived from the entire services rendered by Penn Water from plants in Pennsylvania (except to the Railroad) to PP & L, Philadelphia Company, and Metropolitan Company in Pennsylvania, as well as to Baltimore Company in Maryland. The revenue reductions required by the Commission's order to the Pennsylvania customers were substantially different from the revenue changes arising out of the temporary rates and charges fixed by the Pennsylvania Commission and result in a direct conflict between the two commission orders. By the Federal Power Commission Order, Penn Water was required to file its individual tariffs effecting the reductions in revenues ordered, without regard to the joint obligations of Safe Harbor to render services to certain of the Pennsylvania customers. and without regard to the fact that Penn Water is unable to assume and render service to its Pennsylvania customers as its sole obligation. The reduction in revenues for service by Penn Water to Baltimore Company, required by such Order, was based almost entirely upon an increase allowed by the Commission in the rates or charges of Baltimore Company for purported services by Baltimore Company to Penn Water. Such increase was allowed as a credit to Baltimore Company by offset against the costs found by the Commission to be allocable to the services rendered by Penn Water to Baltimore Company. The Commission's

determination of the allocation of Penn Water's costs incurred and revenues received in rendering service to its various customers was based upon the Commission's erroneous interpretation of the legal effect of the terms of the three-party and two-party contracts between Penn Water, Safe Harbor, and Baltimore Company, and not upon the undisputed facts as to the services rendered by Safe Harbor. A copy of the Commission's Opinion No. 173 and accompanying Order issued January 5, 1949, is attached hereto and made a part hereof as Exhibit D.

XV. On January 28, 1949, Penn Water and Transmission Company filed with the Commission their Application for Rehearing of the Commission's Order of January 5, 1949. Such Application for Rehearing included a request for further hearing to give Petitioners an opportunity to prove a number of facts stated therein, (a) in rebuttal of many statements in the Commission's Opinion No. 173 and findings in its Order; (b) showing changes in facts deemed material by the Commission in its Opinion occurring since the close of the record or since the issuance of the Opinion and Order; and (c) new facts occurring after the close of the record or after the issuance of such order. A copy of such Application for Rehearing of Order issued January 5, 1949, is attached hereto and made a part hereof as Exhibit E.

XVI. By its order issued January 31, 1949, the Commission stayed the effective date of its order of January 5, 1949, pending expiration of the period in which Petitioners' Application for Rehearing may be acted upon and petition for judicial review may be filed. The stay was granted on condition that the difference between payments received by Petitioners under existing arrangements and those which would be required under the Commission's order be segregated in a reserve for the purpose of possible repayment if and to the extent the Commission's order shall finally become effective. A copy of such order of

January 31, 1949, is attached hereto and made a part hereof as Exhibit F.

XVII. By its order issued February 28, 1949, and accompanying Opinion No. 173-A, the Commission denied Petitioner's Application for Rehearing of Order issued January 5, 1949; but in addition amended its Orders of January 5, 1949, and January 31, 1949, making without hearing additional unsupported statements, conclusions, findings, and requirements. The Order of February 28, 1949, was made effective retroactively to February 26, 1949. Under the terms of the Commission's Order of January 31, 1949, the stay of the Commission's Order of January 5, 1949, is effective only until the end of the period in which a petition for judicial review may be filed. Such period is prescribed by Section 313 (b) of the Federal Power Act as "within sixty days after the order of the Commission upon application for rehearing." The effectiveness of the Commission's stay is about to expire and the same considerations which required the granting of the Commission's stay support interim judicial relief in the form of a stay of the Commission's orders, pending final determination of the validity of such orders on this review. A copy of the Commission's Opinion No. 173-A and accompanying order issued February 28, 1949, is attached hereto and made a part hereof as Exhibit G.

XVIII. On March 11, 1949, Penn Water and Transmission Company filed with the Commission their Application for Rehearing of the Commission's order of February 28, 1949. Such Application for Rehearing again included a request for further opportunity for hearing to prove additional facts in rebuttal to statements in the Commission's Opinion No. 173-A and its order of February 28, 1949, and showing additional changes in facts and new facts. It also included a complaint, pursuant to Section 306 of the Federal Power Act (16 U. S. C. § 825e; 49 Stat. 856), against the excessive, unreasonable, and unlawful

rates or charges of Baltimore Company for its purported services to Penn Water, to the extent that the Commission fixed such rates or charges by allowing credits to Baltimore Company therefor in regulating the revenues of Penn Water for its services to Baltimore Company. A copy of such Application for Rehearing of Order issued February 28, 1949, is attached hereto and made a part hereof as Exhibit H.

XIX. By its order issued March 17, 1949, the Commission denied Petitioners' Application for Rehearing of Order issued February 28, 1949. No action was taken by the Commission on Petitioners' complaint as required by Section 306 of the Act. A copy of such order issued March 17, 1949, is attached hereto and made a part hereof as Exhibit I.

XX. Petitioners are here before your Honorable Court for review of the orders, actions, and rulings of the Commission in its Docket No. IT-5915, and for interim judicial relief, pending such review, to prevent the irreparable injury to Petitioners which would result from the effectiveness of the Commission's orders during the pendency of such review in the event such orders are finally held to be unlawful and set aside or modified, and to preserve the *status* during such review. No injury will result to the Commission or to any customer of Petitioners from such interim relief.

The Facts and Statutes Upon Which Jurisdiction Is Based.

I. The final orders of the Commission of which review is sought were issued January 5, 1949, February 28, 1949, and March 17, 1949, purportedly under the provisions of the Federal Power Act (16 U. S. C. § 791a *et seq.*; 41 Stat. 1063; 46 Stat. 797; 49 Stat. 838, 847). Petitioners have applied to the Commission for a rehearing of each of the orders of January 5, 1949, and February 28, 1949, within

the thirty days prescribed by Section 313 (a) of the Act (16 U. S. C. § 825-l (a); 49 Stat. 860), as shown by Exhibits E and H hereto. By its order of February 28, 1949, the Commission denied rehearing of its order of January 5, 1949; and by its order of March 17, 1949, the Commission denied rehearing of its order of February 28, 1949. This Petition for Review is filed within sixty days after both of the orders of the Commission upon the applications for rehearing; and a copy of this Petition for Review is being served forthwith upon a member of the Commission; as required by Section 313 (b) of the Act (16 U. S. C. § 825-l (b); 49 Stat. 860).

II. Section 313 (b) of the Federal Power Act provides for judicial review of orders of the Commission in this Court by written petition to review praying that the orders of the Commission be modified or set aside in whole or in part. Section 313 (b) also provides that if any party shall apply to the Court for leave to adduce additional evidence, and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the Court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms as to the Court may seem proper. Section 313 (c) of the Act (16 U. S. C. § 825-l (c); 49 Stat. 860) provides that the commencement of proceedings for judicial review under Section 313 (b) of the Act shall not, unless specifically ordered by the Court, operate as a stay of the Commission's orders.

III. Section 10 (a) of the Administrative Procedure Act (~~16~~ U. S. C. § 1009 (a); 60 Stat. 243) entitles Petitioners to judicial review of the Commission's orders as persons suffering legal wrong because of such actions and as persons adversely affected and aggrieved by such actions. Section 10 (b) of such Act (~~16~~ U. S. C. § 1009 (b))

specifies the form of proceeding for such review to be that provided by the Federal Power Act, and, in the event of inadequacy thereof, any applicable form of legal action. Section 10 (c) of such Act (16 U. S. C. § 1009 (c)) makes reviewable each of the orders sought to be reviewed herein, and all preliminary, procedural, and intermediate orders, actions, and rulings of the Commission in its Docket No. IT-5915. Section 10 (d) of such Act (16 U. S. C. § 1009 (d)) authorizes the Court to issue all necessary and appropriate process to postpone the effective date of the Commission's orders to the extent necessary to prevent irreparable injury or to preserve status or rights pending conclusion of the review proceedings. Section 10 (e) of such Act (16 U. S. C. § 1009 (e)) provides for the scope of judicial review and the authority of the Court in connection therewith.

The Relief Prayed.

Petitioners pray that:

I. The said Commission orders of January 5, 1949, February 28, 1949, and March 17, 1949, be reviewed by this Court; and that said orders be held unlawful and set aside, or modified as may be necessary to the extent such orders are held unlawful; or that such other orders may be made herein as to this Court may seem just;

II. The said Commission orders of September 1, 1944, October 3, 1944, and April 5, 1946, and the conditions contained in the Commission's Order of January 31, 1949, be reviewed by this Court; that said preliminary, procedural, and intermediate orders and conditions be held unlawful; and that all other preliminary, procedural, and intermediate actions and rulings of the Commission in its Docket No. IT-5915 be reviewed and held unlawful by the Court to the extent necessary to render complete judicial relief from the actions of the Commission;

III. Pending such review by this Court and conclusion of such review proceedings, the effectiveness of the said Commission order of January 5, 1949, be stayed upon such conditions, if any, as to this Court may seem just; and

IV. Petitioners hereby apply to this Court for leave to adduce additional evidence as specified in the offers of proof contained in paragraphs I (6) (h), II (3), II (3) (c), II (7) (c), II (26) (c), II (28) (c), II (41) (b), II (47) (b), II (47) (c), II (50), II (51), II (54) (c), II (56) (c), and II (65), Section 92 of Petitioners' Application for Rehearing of order issued January 5, 1949, attached hereto as Exhibit E; as specified in the offers of proof contained in paragraphs II (6) (b), II (9) (b), II (10) (e), II (10) (h), II (10) (i), II (11) (b), and V of Petitioners' Application for Rehearing of order issued February 28, 1949, attached hereto as Exhibit H; and to prove that the fair value of Petitioners' property used and useful in rendering services to the customers of Penn Water is not less than $41,000,000; that the estimated cost of constructing, as of December 31, 1945, a substitute new plant capable of providing the same service as provided by such property is not less than $55,300,000; that the cost of constructing and reproducing such property, as of December 31, 1945, is not less than $62,400,000; and that the nominal dollar investment in such property, adjusted for changes in purchasing power of the dollar to 1945, is not less than $50,000,000; and as a showing to the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission Petitioners state:

(A) That on their face all of the facts sought to be proved by the offers of proof contained in said Applications for Rehearing are material as facts in rebuttal to statements of the Commission in its Opinions or Orders issued in its Docket No. IT-5915; that to the extent any of the facts alleged in such offers of proof were known to Petitioners prior to the close of the record before the Commission on

July 16, 1947, or occurred after such date and were known to Petitioners prior to the issuance of the Commission's Opinion No. 173 and its order of January 5, 1949, or occurred after the date of such order and were known to Petitioners prior to the issuance of the Commission's Opinion No. 173-A and its order of February 28, 1949, Petitioners had no notice that such facts would be necessary to rebut the arbitrary, capricious, and unlawful and unsupported statements of the Commission in such opinions and orders in reference to which each of such offers of proof were made; that the Commission had notice in fact of the orders of the Pennsylvania Commission, dated September 27, 1948, on or about October 1, 1948; that the facts occurring after either of the Commission's orders of January 5, 1949, and February 28, 1949, could not have been adduced as evidence in the proceedings before the Commission except by way of offers of proof as so made; and that the Commission, by its orders of February 28, 1949, and March 17, 1949, refused to give Petitioners any opportunity to adduce such evidence; and

(B) That the facts as to fair value, cost of construction of a substitute new plant, cost of construction and reproduction, and adjusted dollar investment were the subject of offers of proof in the proceedings before the Commission as evidence material and relevant to a determination of the valuation of Petitioners' property for purposes of rate making under either Section 20 or Sections 206 (a) and 208 (a) of the Federal Power Act (16 U. S. C. §§ 813, 824e (a), 824a (a); 41 Stat. 1073, 49 Stat. 852, 853) and to a determination of the fair rate of return and the fair return allowance; and that the Commission refused to allow such evidence to be adduced before it.

V. This Court grant such further relief as may seem just and proper in the premises.

The Points on Which Petitioners Intend to Rely.

I. The Federal Power Commission had no jurisdiction, authority, or power to issue and enforce its said Orders of September 1, 1944, October 3, 1944, April 5, 1946, January 5, 1949, February 28, 1949, and March 17, 1949, or the conditions of its said Order of January 31, 1949, in its Docket No. IT-5915 for the following reasons:

(A) There was no substantial evidence of record before the Commission to support any exercise of jurisdiction by the Commission under either Sections 19 or 20 of Part I of the Federal Power Act (16 U. S. C. §§ 812, 813; 41 Stat. 1073, 49 Stat. 847); and exclusive jurisdiction to regulate any of Petitioners' rates or charges is vested in the Pennsylvania and Maryland Commissions by such Sections;

(B) None of the provisions of Part II of the Federal Power Act (16 U. S. C. §§ 824-824h; 49 Stat. 847) authorize or support the issuance of the said Commission orders, for the reason that Penn Water must be treated as a licensee within the meaning of Part I of the Act, and such a licensee is not subject to the rate regulatory provisions of Part II of the Act;

(C) The Commission does not have jurisdiction, authority, or power under either Sections 20, 201, or 206 (a) of the Federal Power Act (16 U. S. C. §§ 813, 824, 824e; 41 Stat. 1073; 49 Stat. 847, 852) to regulate, control, determine, or fix so much of Petitioners' services or rates, charges, or classifications for services not constituting interstate or foreign commerce, or the rules, regulations, practices, or contracts affecting such rates, charges, or classifications;

(D) Neither the provisions of Section 206 (a) of the Federal Power Act, nor any other provisions of the Act, authorize or support the issuance of the said Commission Orders for the reasons that:

(1) Neither Penn Water nor Transmission Company have any rates, charges, or classifications subject to the jurisdiction of the Commission, within the meaning of Section 206 (a) of the Act or of Section 205 of the Act (16 U. S. C. 1946 ed. § 824d; 49 Stat. 851), in that:

(a) The rendering of services by Penn Water to Metropolitan Company, and jointly with Safe Harbor to PP & L, and Philadelphia Company, and the rates, charges, and classifications therefor, constitute transactions in intrastate commerce and do not constitute transactions, transmissions, or sales in interstate commerce, within the meaning of Sections 201 (b) and (c) of the Act; and there is no substantial evidence of record to the contrary.

(b) The rendering of services by Penn Water, jointly with Safe Harbor, Baltimore Company, and PEPCO to the Railroad, and the rates, charges, and classifications therefor, do not constitute sales of electric energy at wholesale, within the meaning of Sections 206 (a) and 201 (d) of the Act; and there is no substantial evidence of record to the contrary.

(c) Penn Water has no rates, charges, or classifications for the transmission or sale of electric energy to Baltimore Company, within the meaning of Sections 206 (a) and 201 (b) of the Act.

(d) Certain of the rates, charges, or classifications of Penn Water, or Penn Water and Safe Harbor jointly, for services rendered to Metropolitan Company, PP & L, and Philadelphia Company are not rates, charges, or classifications for the transmission or sale of electric energy, within the meaning of Sections 206 (a) and 201 (b) of the Act.

(2) The services rendered by Penn Water to PP & L, Philadelphia Company, Railroad Company, and Baltimore Company are rendered jointly with others not

made Respondents to these proceedings, and the rates, charges, and classifications therefor are joint; there is no substantial evidence of record to the contrary; and the said Commission Orders were issued without notice or opportunity for hearing to Safe Harbor jointly obligated to and jointly serving the foregoing customers, contrary to the provisions of Section 206 (a) of the Act and the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) The said Commission Order of January 5, 1949, requires Penn Water alone to file new schedules of rates and charges for services to PP & L and Philadelphia Company without requiring Safe Harbor to join or concur in the filing of such schedules, without authority under the Federal Power Act; thereby requiring Penn Water to assume the entire obligations to such customers instead of the joint obligation which exists to the impairment of its ability to render adequate service to its customers within the meaning of Section 207 of the Act (16 U. S. C. 1946 ed. § 824f; 49 Stat. 853); and there is no substantial evidence of record to the contrary.

(4) Insofar as the said Commission Order of January 5, 1949, undertakes to require a reduction in the revenues of Penn Water alone it constitutes regulation by the Commission of the divisions of revenue received by Penn Water for its participation in the rendering of joint services to each of its customers except Metropolitan Company, without jurisdiction, authority, or power in the Commission to regulate divisions of rates or charges for joint service under the Federal Power Act.

(5) There is no substantial evidence of record nor adequate subsidiary findings to support any finding by the Commission that any of the rates, charges, or classifications, demanded, observed, charged, or collected by Penn Water, or that any rule, regulation, practice, or contract affecting any such rate, charge or classification is unjust,

unreasonable, unduly discriminatory or preferential, as required by Section 206 (a) of the Act or by Section 20 of the Act.

(6) The said Commission Orders of January 5, 1949, and February 28, 1949, were issued without a fair hearing, and the said Commission Orders of September 1, 1944, October 3, 1944, and April 5, 1946, operated to deprive Petitioners of an opportunity for such a hearing, in violation of Section 206 (a) of the Act, Section 20 of the Act insofar as such Section 20 makes applicable the provisions of Section 15 (1) of the Interstate Commerce Act (49 U. S. C. § 15 (1); 24 Stat. 384, 34 Stat. 589, 36 Stat. 484, 48 Stat. 1102, 54 Stat. 911), and contrary to the provisions of the due process clause of the Fifth Amendment to the Constitution of the United States.

(E) If the Federal Power Act can properly be construed otherwise than as described in paragraphs (A), (B), (C), and (D) above, the same is unconstitutional because in violation of the Tenth Amendment to the Constitution of the United States.

(F) The said Commission Order of January 5, 1949, requires Petitioners to make changes from time to time in the future in rates and charges for services to Baltimore Company without notice, opportunity for hearing, or findings as of such future times that the then existing rates and charges are unjust, unreasonable, unduly discriminatory, or preferential as of such future times, upon the basis of the facts as of such future times; without authority under the Federal Power Act and contrary to the provisions of Section 206 (a) of the Act; and contrary to Article I, Section 1, of the Constitution of the United States.

(G) The said Commission Order of January 5, 1949, and the conditions contained in its Order of January 31, 1949, purport to make effective the requirements of said Order of January 5, 1949, within a period of less than thirty days from the date of issuance of such order, contrary to

Petitioners' rights and the limitations on the Commission's power under the provisions of Section 15 (2) of the Interstate Commerce Act (49 U. S. C. § 15 (2); 34 Stat. 589; 36 Stat. 551; 41 Stat. 484), as made applicable by Section 20 of the Federal Power Act.

(H) To the extent that the conditions contained in the said Commission Order of January 31, 1949, purport to permit the Commission subsequently to enter an order *nunc pro tunc,* or otherwise, requiring any reduction in Petitioners' revenues, rates, or charges, under its Order of January 5, 1949, retrospectively from any date prior to the date of the subsequent order, and requiring reparation or repayment of any money amounts in excess of twenty dollars to any persons, such order is in excess of any statutory authority of the Commission under the Federal Power Act, deprives Petitioners and Safe Harbor of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and is contrary to and in violation of Article III, Section 1 of, and the Seventh Amendment to, the Constitution of the United States.

(I) To the extent that the said Commission Order of February 28, 1949, extended or modified its Orders of January 5, 1949, and January 31, 1949, adversely against Petitioners without hearing it is unlawful and in excess of the authority contained in Section 313 (a) of the Federal Power Act, and in violation of Section 206 (a) of the Act, and deprives Petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

II. The said Commission Orders, accompanying Opinions, and the statements, findings and conclusions contained therein, and the rates and charges which purport to be thereby determined, fixed, prescribed, and required to be filed, charged, and observed are unlawful and unconstitutional in that they are unreasonable, arbitrary, capricious,

discriminatory, in excess of the Commission's statutory jurisdiction, authority, and limitations under the Federal Power Act and contrary to the provisions of such Act, without observance of the procedure required by law, unsupported by substantial evidence, contrary to the substantial evidence, and result from failure of the Commission to make proper findings and determine proper facts and conclusions of law; and if enforced would deprive petitioners and Safe Harbor of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States; all as set forth in Petitioners' Applications for Rehearing attached hereto as Exhibits E and H and without in any manner limiting or waiving the points or reasons set forth in said Applications for Rehearing the said orders, opinions, statements, findings, conclusions, rates and charges are unlawful and unconstitutional as aforesaid in the following particular respects:

(A) *Erroneous Allocation of Costs and Revenues.*

(1) The Commission's conclusions as to excessive revenues from Petitioners' services to Baltimore Company are based upon an allocation of costs and revenues which is in error in the following respects:

(a) Substantially all of the purported excess revenues from Baltimore Company result from a determination and allowance by the Commission of an increase in Baltimore Company rates, charges, or revenues in the form of a credit for its purported services to Penn Water, without notice that the reasonableness or lawfulness of such Baltimore Company rates, charges, or revenues were at issue in the proceeding before the Commission, without substantial evidence to support any such increase over the existing rates or charges, without adequate findings to support such an increase, and without observance of the procedure required by the Federal Power Act; and the Commission failed to act upon a complaint by Penn Water, under Sec-

tion 306 of the Federal Power Act (16 U. S. C. §§ 825e; 49 Stat. 856), against the excessiveness, unreasonableness, and unlawfulness of such Baltimore Company rates, charges, and revenues.

(b) Such credit of revenues to Baltimore Company was based in substantial part upon an assumed "diversion" by Penn Water of Safe Harbor energy and capacity for service to Pennsylvania customers to which Baltimore Company was assumed to be "entitled" under an erroneous construction of the respective obligations, rights, and "entitlements" of Safe Harbor, Penn Water, and Baltimore Company created by the three-party contract between them and by the contracts of Penn Water and Safe Harbor with their Pennsylvania customers.

(c) Such credit of revenues to Baltimore Company for an assumed "diversion" of Safe Harbor services was not determined upon the basis of the Safe Harbor costs of such services, but was determined upon the basis of assumed higher Baltimore Company costs, having no support by substantial evidence of record.

(d) Such purported excess revenues from Baltimore Company are based in part upon an arbitrary inclusion, in revenues from Baltimore Company, of net revenues actually received from other customers for interchange transactions conducted with them by Penn Water or by Penn Water and Safe Harbor jointly.

(e) Such purported excess revenues from Baltimore Company are based in part upon an arbitrary reduction in the division of revenues received by Penn Water from Baltimore Company for service to the Railroad and including such amount as revenues from Baltimore Company, without authority to adjust or regulate such division under the Federal Power Act, and without support by adequate findings or by the evidence of record; and the reduction in the revenues Penn Water is to receive from

Baltimore Company was based in part upon the arbitrary elimination of income taxes as an expense on that portion of the Penn Water division of Railroad revenues determined by the Commission to be "excess".

(f) Such purported excess revenues from Baltimore Company are based in part upon an allocation of costs to Baltimore Company which does not reflect the actual substantially greater use of Petitioners' plant in rendering services to Baltimore Company.

(2) The Commission's conclusions as to excessive revenues from Petitioners' services to each of its customers are based upon an allocation of costs and revenues which is in error in the following respects:

(a) The purported excess revenues from services to each of Petitioners' customers are based in part upon the arbitrary elimination of substantial actual expenses incurred by Petitioners in rendering such services, without adequate findings or evidence to support such eliminations.

(b) Not all of the normal costs of power received by Penn Water from Safe Harbor for use in serving their Pennsylvania customers were included in the total costs allocated by the Commission; and in the event the Commission's Order in its Docket No. IT-5914, reducing the revenues paid by Penn Water to Safe Harbor is set aside in pending litigation, and in the event the orders of the Pennsylvania Commission of September 27, 1948, are sustained in pending litigation, Penn Water will be liable to pay to Safe Harbor substantial amounts in excess of the amounts included in Penn Water's expenses by the Commission.

(B) *Rate of Return and Return.*

The rate of return and return allowed by the Commission is not commensurate with returns on investments in other enterprises having corresponding risks and is insuffi-

cient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital; and if the Commission's Order of January 5, 1949, were enforced in this respect it would deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(C) *Rate Base.*

(1) The Federal Power Commission, by its orders fixing the rates, charges, and revenues to which Petitioners are entitled used a rate base arrived at by deducting from purported actual legitimate investment in Petitioners' project, the adjusted book reserve for depreciation, and adding thereto an insufficient allowance for working capital. Such a rate base is unsupported by substantial evidence and contrary to the substantial evidence and the provisions of the Federal Power Act; and the Commission erred in deducting from purported actual legitimate investment the adjusted book reserve for depreciation on a finding that such depreciation reserve was accumulated from earnings in excess of a fair return, which finding is not supported by substantial evidence and contrary to the substantial evidence. Petitioners contend that the determination of rates on an investment basis requires the use of an undepreciated rate base with an appropriate credit to the rate payer measured by the earnings available on risk-free investment thereof, otherwise the rates determined thereon fail to afford a return of all of the costs of service.

(2) The Federal Power Commission by its orders fixing the rates, charges, and revenues to which Petitioners are entitled erroneously determined that the actual legitimate investment in Petitioners' electric plant used and useful was $33,113,148.00 as of December 31, 1946, that for the purpose of fixing a proper rate base it is fair and reasonable to use the 1946 year's average actual legitimate

investment in Petitioners' electric plant used and useful of $33,126,585, that Petitioners' net investment rate base for the year 1946 was $24,774,712.00 and that it is fair and reasonable to use $33,113,148.00 plus the recorded cost of additions less recorded retirements, as the actual legitimate investment in Petitioners' electric plant used and useful for the future. Said determinations are unreasonable, arbitrary, capricious, unlawful, unsupported by substantial evidence, contrary to the provisions of the Federal Power Act, and deprive Petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, for the reasons specified in paragraph (1) above and in that they exclude from Petitioners' actual legitimate investment and their rate base, a total of $3,465,677.73 being composed of the following items of original cost:

Value of McCall Ferry Power Company stock issued for Land and Water Power Rights:		
McCall Company stock issued to Hutchinson as part consideration for land and water power rights—18,840 shares common at $25 per share	$471,000.00	
McCall Company stock issued for organization expenses of company—10 shares common at $25 per share	250.00	
McCall Company stock issued to Harlow-McGaw as part consideration for land and water power rights—1,000 shares common at $25 per share	25,000.00	

McCall Company stock issued to C. D. Pullen as part consideration for options on Harlow McGaw properties —150 shares common at $25 per share	3,750.00	$500,000.00
Fisk Management Fee:		
McCall Company stock issued to Harvey Fisk & Sons for management services		199,570.31
Aldred Management Fee:		
Pennsylvania Company stock issued to J. E. Aldred for management services for period Nov. 1, 1908 to Oct. 31, 1912—5,000 shares at $60 per share—$300,000—Portion applicable to construction period Nov. 1, 1908 to Sept. 30, 1911 on a prorated basis		218,750.00
Stock Issuance Expense:		
McCall Company bond issuance expense applicable to Pennsylvania Company stock exchanged for McCall Company bonds	331,703.15	
Expenses incurred in connection with the issuance of Capital stock of Pennsylvania Company from 1923 to 1935	81,906.59	413,609.74
Interest During Construction (including operating income for the period July 1 to Sept. 30, 1911)		1,008,579.57

Disallowed Costs Relating to "Cessation Period"		143,981.46
Promotion Expense		29,601.59
Difference between Respondents [Petitioners] and Staff as to Value in 1908 of $703,000 Susquehanna Power Company Bonds and 1,500 shares of Susquehanna Properties Company Stock issued in Exchange for McCall Company Properties and Water Power Rights Located Below McCall Development		37,063.98
Profit on Certain Property Sold to Safe Harbor Water Power Corp.		119,940.20
Flashboard Development Costs		49,754.97
Land and Water Rights Acquired Since Dec. 31, 1909:		
Acquisition expenses and necessary legal and engineering services	171,134.28	
Establishment of gauges for determination of river flow.	12,420.77	
Costs of property acquired from the Baltimore Electro Alloys Co., a former affiliate	24,151.83	
Acquisition costs of property described as Boyd Mill tract charged in error to operating expenses when incurred.	1,427.42	209,134.30
Conowingo Backwater Litigation		39,301.46
Donations in Aid of Construction.		18,127.71
Loss of Materials and Supplies and Cash Unaccounted for		13,164.03

Susquehanna Contracting Co. Administrative Expenses	6,621.85
Construction Fee Charged to Holtwood Power Co.	50,194.73
Holtwood Power Co. Organization Expense	17,875.34
Riverside Line—Four Unused Tower Foundations	3,595.96
Physical Items of Property Which Were Originally Charged in Error to Operating Expenses or Depreciation Reserve	96,116.84
Holtwood Church	1,400.00
River Coal Investigation Expense.	6,132.41
Construction Work in Progress	205,243.01
Property Held for Future Use	77,918.28
Total Items Described Above.	$3,465,677.73

(D) *Depreciation.*

The orders, findings, and conclusions of the Federal Power Commission insofar as they relate to depreciation are unsupported by substantial evidence, contrary to the substantial evidence, arbitrary, capricious, unreasonable, contrary to law and the Federal Power Act, and deprive Petitioners of their property without due process of law contrary to the Fifth Amendment to the Constitution of the United States because:

(1) The Federal Power Commission's purported determination of depreciation is not the actual depreciation in Petitioners' property but simply represents an unsupported guess as to the consumed "service life" of Petitioners' property, determined by fixing so-called "service lives" of Petitioners' property which bear no relationship thereto; and

(2) The Federal Power Commission has considered as depreciable property certain elements of Petitioners' property which are in fact and in law non-depreciable.

(E) *Failure to Make Specific Findings of Fact.*

The said Commission orders of January 5, 1949, and February 28, 1949, failed to make certain specific findings of fact as requested by Petitioners in their Applications for Rehearing, attached hereto as Exhibits E and H.

(F) *Denial of Applications for Rehearing.*

The said Orders of February 28, 1949, and March 17, 1949, are unlawful and unconstitutional in that they are unreasonable, arbitrary, capricious, and deprive Petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States for each and all of the reasons specified in Petitioners' Application for Rehearing of Order issued February 28, 1949, attached hereto as Exhibit H; and by reason of the new facts stated in such Application and in Petitioners' Application for Rehearing of Order issued January 5, 1949, attached hereto as Exhibit E.

(G) *Other Objections and Exceptions.*

Petitioners do not waive but expressly reaffirm and renew each and all of the objections and exceptions to the jurisdiction of the Commission and to the admission or exclusion of evidence, as shown by the transcript of the record before the Commission.

Respectfully submitted,

Sgd. F. G. AWALT,
F. G. Awalt,
Sgd. RAYMOND SPARKS,
Raymond Sparks,
Sgd. DARYAL A. MYSE,
Daryal A. Myse,
Sgd. PRESTON C. KING, JR.,
Preston C. King, Jr.,
Counsel for Petitioners.

Dated at Washington, D. C.
April 22, 1949.

DISTRICT OF COLUMBIA: ss.:

The undersigned, being first duly sworn, states that he is counsel for the Petitioners in the foregoing Petition; that he has read said Petition and knows the contents thereof; and that all of the statements contained therein are true and correct to the best of his knowledge, information or belief.

Sgd. RAYMOND SPARKS
Raymond Sparks

Sworn to and subscribed before me, a notary public, in and for said District of Columbia, this 22d day of April, 1949.

Sgd. FLORA A. MEYERS,
(Seal) *Notary Public, D. C.*
My Commission expires Oct. 14, 1953.

EXHIBIT A TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Commissioners } Basil Manly, Acting Chairman, Claude L. Draper and John W. Scott. Nelson Lee Smith not participating.

September 1, 1944

In the Matter of Pennsylvania Water & Power Company } Docket No. IT-5915

ORDER INSTITUTING INVESTIGATION

Upon consideration of the petition filed on August 31, 1944, by the Maryland Public Service Commission requesting this Commission to institute an investigation of the interstate wholesale rates of Safe Harbor Water Power Corporation and Pennsylvania Water & Power Company, and the joint petition filed on August 14, 1944, by counsel for the Mayor and City Council of Baltimore, Maryland, counsel for the County Commissioners of Baltimore County, Maryland, counsel for Bethlehem-Fairfield Shipyard, Inc., and counsel for Rustless Iron & Steel Corporation, also requesting this Commission to institute such investigation; and

It appearing to the Commission that:

(a) Pennsylvania Water & Power Company owns and operates facilities, among others, used for the transmission and sale at wholesale

(i) of electric energy generated in Pennsylvania and transmitted therefrom to Maryland and the District of Columbia, and

(ii) of electric energy generated in Maryland and the District of Columbia and transmitted therefrom to Pennsylvania,

all such electric energy being consumed at points outside the respective States in which it is generated. Such facilities are facilities for the transmission and sale at wholesale of electric energy in interstate commerce. Pennsylvania Water & Power Company is a public utility within the meaning of that term as used in the Federal Power Act.

(b) Pennsylvania Water & Power Company owns and operates the Holtwood hydroelectric project on the Susquehanna River in Pennsylvania and by order of November 3, 1939, in Docket No. IT-5524, the Commission required the Company to apply for a license for said project under the Federal Power Act. On review the Commission's order was affirmed in *Pennsylvania Water & Power Company* v. *Federal Power Commission* (App. D. C.) 123 F. (2d) 155; *cert. denied*, 315 U. S. 806. By order of November 23, 1943, the Commission authorized the issuance of a license for the Holtwood Project No. 1881. On December 22, 1943, the Company filed an application for rehearing with respect to the amortization reserve provisions of the Commission's order of November 23, 1943, and such rehearing was granted by order of January 21, 1944, and the matter is now pending before the Commission.

(c) In addition to an agreement involving the transmission and sale of electric energy subject to the jurisdiction of the Commission to which Pennsylvania Water & Power Company is a party, and which is designated in the files of the Commission as Pennsylvania Water & Power Company

Rate Schedule FPC No. 1 and Supplement No. 1 thereto, Safe Harbor Water Power Corporation and Pennsylvania Water & Power Company are both parties to certain agreements involving the transmission and sale of electric energy subject to the jurisdiction of the Commission, which said agreements include those designated in the files of the Commission as follows: Safe Harbor Water Power Corporation Rate Schedule FPC No. 1 (also designated as Pennsylvania Water & Power Company Rate Schedule FPC No. 8), and Supplements Nos. 1 and 2 thereto; Safe Harbor Water Power Corporation Rate Schedule FPC No. 3 and Supplements Nos. 1 and 2 thereto, and Supplement No. 1 to Supplement No. 2 thereto; Safe Harbor Water Power Corporation Rate Schedule FPC No. 4 and Supplements Nos. 1 and 2 thereto; Safe Harbor Water Power Corporation Rate Schedule FPC No. 5.

(d) By order of September 1, 1944, the Commission has instituted an investigation of the interstate wholesale rates of Safe Harbor Water Power Corporation.

The Commission *finds* that:

It is necessary and proper in the public interest, and to aid in the enforcement of the provisions of the Federal Power Act, that an investigation be instituted by the Commission into and concerning all rates, charges, or classifications demanded, observed, charged, or collected by Pennsylvania Water & Power Company for or in connection with any transmission or sale of electric energy subject to the jurisdiction of the Commission, and any rules, regulations, practices, or contracts affecting such rates, charges, or classifications.

The Commission *orders* that:

An investigation be and the same hereby is instituted for the purpose of enabling the Commission:

(A) To determine whether, in connection with any transmission or sale of electric energy subject to the jurisdiction of this Commission under the Federal Power Act, by Pennsylvania Water & Power Company, any rates, charges, or classifications demanded, observed, charged, or collected, or any rules, regulations, practices, or contracts affecting such rates, charges or classifications, are unjust, unreasonable, unduly discriminatory or preferential; and

(B) If, after hearing, it shall find that any of such rates, charges, classifications, rules, regulations, practices, or contracts are unjust, unreasonable, unduly discriminatory, or preferential, to determine and fix by appropriate order or orders, just and reasonable rates, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force.

By the Commission.

(Signed) J. H. GUTRIDE
J. H. Gutride
Acting Secretary.

(Seal)

EXHIBIT B TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Basil Manly, Chairman; Claude L. Draper, Leland Olds, John W. Scott and Nelson Lee Smith.

October 3, 1944

In the Matter of Pennsylvania Water & Power Company	Docket No. IT-5915

SUPPLEMENTAL ORDER ENLARGING INVESTIGATION

It appearing to the Commission that:

(a) By order of September 1, 1944, the Commission instituted an investigation of Pennsylvania Water & Power Company to determine whether, in connection with any transmission or sale of electric energy subject to the jurisdiction of the Commission, any rates, charges, or classifications demanded, observed, charged or collected, or any rules, regulations, practices, or contracts affecting such rates, charges or classifications, are unjust, unreasonable, unduly discriminatory or preferential; and if, after hearing, found to be unjust, unreasonable, unduly discriminatory or preferential, to determine and fix by order or orders, just and reasonable rates, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force.

(b) Susquehanna Transmission Company of Maryland is a wholly owned subsidiary of Pennsylvania

Water & Power Company and owns transmission lines and facilities which are operated as and constitute an integral part of the transmission system of Pennsylvania Water & Power Company, and are utilized in the transmission and sale at wholesale of electric energy in interstate commerce from the Safe Harbor hydroelectric generating plant of Safe Harbor Water Power Corporation and from the system of Pennsylvania Water & Power Company.

The Commission *finds* that:

It is necessary and proper, in the public interest, and to aid in the enforcement of the provisions of the Federal Power Act that the investigation instituted by the order of September 1, 1944, of Pennsylvania Water & Power Company be enlarged to include Susquehanna Transmission Company of Maryland.

The Commission *orders* that:

(A) The investigation instituted by the Commission's order of September 1, 1944, be and the same is hereby enlarged to include Susquehanna Transmission Company of Maryland for the purpose of enabling the Commission to determine whether, in connection with any transmission or sale of electric energy by Pennsylvania Water & Power Company or Susquehanna Transmission Company of Maryland subject to the jurisdiction of the Commission, any rates, charges, or classifications demanded, observed, charged or collected, or any rules, regulations, practices, or contracts affecting such rates, charges or classifications, are unjust, unreasonable unduly discriminatory or preferential; and

(B) If, after hearing, it shall find that any of such rates, charges, classifications, rules, regulations, practices or contracts are unjust, unreasonable, unduly discriminatory, or preferential, to determine

and fix by appropriate order or orders, just and reasonable rates, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force.

By the Commission.

(Signed) LEON M. FUQUAY
Leon M. Fuquay
Secretary.

(Seal)

EXHIBIT C TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Leland Olds, Chairman; Claude L. Draper and Harrington Wimberly.

April 5, 1946

In the Matter of Pennsylvania Water & Power Company	Docket No. IT-5915

ORDER DENYING PETITION

Upon consideration of the "Petition for Specification of Issues and Reconsideration of Direction Fixing Order of Procedure" filed April 3, 1946, by Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland;

The Commission *orders* that:

The petition be and the same is hereby denied; Provided, however, that nothing herein shall preclude the Trial Examiner from taking any steps he deems appropriate at the hearing to assure adequate definition of the position of all participants in the proceedings, and clarification of the issues to be determined.

By the Commission.

(Signed) LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

(Seal)

EXHIBIT D TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 173

In the Matter of Pennsylvania Water & Power Company } Docket No. IT-5915

APPEARANCES.

For Respondents
George T. Hambright
F. G. Awalt
Raymond Sparks
Daryal A. Myse
Preston C. King, Jr.
George Ross Hull
John C. Kelley

For Consolidated Gas Electric Light and Power Company of Baltimore
Edwin M. Sturtevant
Clarence W. Miles
G. Kenneth Reiblich

For Public Service Commission of Maryland
Robert France
Charles D. Harris

For Public Utility Commission of Pennsylvania
Samuel G. Miller
Arthur J. Diskin
Charles E. Thomas
William M. Rutter

For Staff of the Federal Power Commission
Howard E. Wahrenbrock
Reuben Goldberg
Francis L. Hall

[1]* OPINION

By THE COMMISSION:

This is a proceeding under the Federal Power Act (Act)[1] upon an order of the Commission instituting an investigation to determine just and reasonable rates and charges for the Respondents, Pennsylvania Water & Power Company (Penn Water) and Susquehanna Transmission Company of Maryland (Transmission Company), the latter being Penn Water's wholly-owned affiliate.[2] The matters at issue involve a determination of the scope of the jurisdiction of the Commission with respect to the rates and charges of Penn Water, a determination of the amount of the rate base (including the investment of both Penn Water and Transmission Company) and the fair rate of return with respect thereto, the amount, if any, of revenues received by Penn Water in excess of the reasonable cost of service rendered by Penn Water and Transmission Company and of resulting reductions in rates subject to the Commission's jurisdiction.

[2] BACKGROUND OF PROCEEDING

By an order issued September 1, 1944, and a supplemental order issued October 3, 1944, the Commission instituted an investigation of rates and charges charged or collected by Respondents with respect to any transmission or sale of electric energy subject to the Commission's jurisdiction under the Federal Power Act. This investigation was instituted to enable the Commission to determine whether any of the foregoing rates and charges were unjust, unrea-

* Figures in brackets represent page numbers of Opinion in typewritten form.

1. 49 Stat. 838; 16 U. S. C. 791a, et seq.

2. By agreement, Penn Water pays all of the expenses of Transmission Company and in addition, has waived interest on the outstanding first-mortgage bonds of Transmission Company, all of which Penn Water owns. In exchange, Transmission Company transmits electric power and energy delivered to it by Penn Water at the Pennsylvania-Maryland state line for redelivery in Maryland or delivered to it in Maryland for redelivery to Penn Water at the said state line. Transmission Company, therefore, has no separate rates or charges.

sonable, or unduly discriminatory. Previously, however, there had been received two petitions requesting that the Commission undertake such an investigation, the one a joint petition filed August 14, 1944, by the Mayor and City Council of Baltimore, Maryland, The County Commissioners of Baltimore County, Maryland, Bethlehem-Fairfield Shipyard, Inc., and Rustless Iron & Steel Corporation, and the other a petition filed August 31, 1944 by the Public Service Commission of Maryland (Maryland Commission).

The Public Utility Commission of the Commonwealth of Pennsylvania (Pennsylvania Commission), the Maryland Commission, and Consolidated Gas Electric Light and Power Company of Baltimore (Md.) (Baltimore Company) [3] petitioned to become interveners in this proceeding. The Commission permitted intervention in each instance, and each of the interveners took active part in the proceedings.

Extensive hearings were held commencing April 15, 1946 and concluding July 16, 1947. The evidence received and the briefs have been carefully considered.

[3] PROPERTIES AND OPERATIONS

The Respondent, Penn Water, owns and operates the hydroelectric plant at Holtwood (Pa.), the Holtwood steam plant, and that part of an interconnected interstate transmission system consisting of various substations, transmission lines and associated equipment which are located in Pennsylvania. The respondent, Transmission Company, owns and operates that part of the same transmission system consisting of various substations, transmission lines and associated equipment which are located in Maryland. The facilities involved include the main dam, power house, turbines, 25- and 60-cycle electric generators, and frequency changers, all located at Holtwood (Pa.); the steam electric

3. Baltimore Company purchases electric power and energy from Penn Water and is further engaged in the generation, purchase, distribution and sale of electric power and energy in the City of Baltimore and elsewhere in the State of Maryland.

generating plant, coal recovery and preparation plant and accessory equipment,[4] transformer stations,[5] transmission lines, switching stations and facilities; and an operators' village. The hydroelectric and steam generating plants, with appurtenant facilities and equipment, are located together on the Susquehanna River, some 9 miles north of the Pennsylvania-Maryland state line, near what was formerly known as McCall's Ferry, in the Counties of Lancaster and York, Pennsylvania.

Ten hydro turbines in Penn Water's hydroelectric plant have a nominal total capacity of 150,000 hp. Eight 25-cycle generators have a total rated capacity of 87,000 kw, and two 60-cycle generators 24,000 kw, for a plant nominal rated capacity of 111,000 kw or a total [4] reported effective capacity of 104,000 kw. Two 60-cycle generators in Penn Water's steam electric generating plant have a nominal rating of 10,000 kw each, or a 3-hour peak rating of 28,000 kw.[6]

To provide for increased flexibility in system operations there were installed in the Holtwood hydro plant (1923) two 5,000 kw frequency changers for the conversion of 25-cycle energy, generated at the plant or received at the plant from other sources, to 60-cycle energy, and likewise for the conversion of 60-cycle energy to 25-cycle energy, as system demands require.

Respondents' interconnected interstate transmission system is a regional network comprising 566 circuit miles of high-voltage lines which include 60-cycle three-phase and 25-cycle single and three-phase circuits installed as tower lines of from one to four circuits each. These circuits operate at 220 kv and 66 kv, as to the 60-cycle (three-phase) circuit, and 132 kv (single-phase) and 66-kv (three-phase) as to the 25-cycle circuits.

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4. Also located at Holtwood (Pa.), the coal-recovery equipment being used to dredge, dry and mill low-cost river-bottom anthracite coal recovered from the Holtwood dam pond, for use in the steam electric generating plant.

5. Conestoga and Holtwood, in Pennsylvania; Highlandtown in Maryland.

6. The 3-hour peak rating is effective from September 15 to May 15; the base load rating of the steam plant is 26,000 kw at all times.

The hydroelectric development at Safe Harbor (Pa.) is owned and operated by Penn Water's affiliate, Safe Harbor Water Power Corporation (Safe Harbor). From interconnections with Safe Harbor's transmission facilities, the entire output of Safe Harbor is transmitted to Pennsylvania customers over the facilities of Penn Water and to Maryland customers over the facilities of both Respondents. These facilities are interconnected with the facilities of Penn Water's Pennsylvania customers, including the Thorndale-Columbia section of [5] The Pennsylvania Railroad (Railroad), and with the facilities of Baltimore Company and Potomac Electric Power Company (PEPCO),[7] and the Perryville (Md.)-Benning (D. C.) section of the Railroad.

Operations of Penn Water, Safe Harbor and Baltimore Company are closely integrated and coordinated as a matter of economy, efficiency, flexibility, and maximum utilization of hydro capabilities, contracts being carefully worked out for that purpose as to firm energy requirements, while operations involving firm, interchange and emergency energy are conducted at all times by a dispatching system controlled by a dispatcher's office in coordination with various operating committees. In addition to the foregoing coordination and integration of operations, the constituent companies of this interconnected system plan and coordinate far in advance steam maintenance schedules which are based largely upon the predicted flows of the Susquehanna River and the determination of the availability of hydro energy during periodic steam maintenance outages.

That hydroelectric operations involve something more than the mere addition of cheaper energy to the system is revealed by the fact that such energy can be used for peaking purposes at such times that its location on comparatively sharp peak portions of the load curve permits substantial economy in system plant investment. Further, the

7. PEPCO is engaged in the generation, distribution, sale and delivery of electric power and energy in the District of Columbia and in adjoining territory in the State of Maryland.

quick-starting characteristics of Penn Water's hydroelectric generating equipment and the specially designed steam generating equipment of the Holtwood steam plant, as well as the interconnections with [6] the electrical systems of Penn Water's Pennsylvania customers, enable significant load swings, particularly characteristic of Baltimore Company's system's industrial load, to be carried with a minimum of difficulty and of investment expense.

Corporate Relationships

The Respondent, Penn Water, was organized January 13, 1910 under the laws of the Commonwealth of Pennsylvania as successor to McCall Ferry Power Company (McCall Company). The latter company had failed in 1908 while engaged in construction of the present Holtwood dam and power house, and the installation of certain appurtenant hydroelectric generating equipment and facilities. The organization of Penn Water followed a receivership which was accompanied by a foreclosure and sale of the properties of McCall Company and came about as the result of negotiations for the necessary additional financing which had been conducted by a committee representing the bondholders of McCall Company.

The Respondent, Transmission Company, was organized April 19, 1910, under the laws of the State of Maryland as a consolidation of two county pole-line companies. The then outstanding stock of the two predecessor companies was owned by McCall Company (Penn Water's predecessor) and the outstanding 12,055 shares of stock of Transmission Company are entirely owned by Penn Water.

Safe Harbor, also an affiliate of Penn Water, was organized under the laws of the Commonwealth of Pennsylvania, January 6, 1930. Safe Harbor has outstanding a total of 300,000 shares of non-par common stock divided into two classes: Class A, 100,000 shares of non-voting [7] stock, owned entirely by Baltimore Company, and Class B, 200,000 shares of voting stock, owned 50% by Penn Water and 50% by Baltimore Company.

CONTRACTS.

Under a contract with Baltimore Company, dated December 31, 1927, as supplemented on several occasions thereafter, Penn Water is obligated to provide Baltimore Company at all times with all the capacity and energy available to the former (Penn Water) from its own hydro and steam generating plants, and from its Safe Harbor one-third entitlement, referred to below, insofar as such power and energy is not required in connection with contracts to which Penn Water is a party and which Baltimore Company has approved. In turn, Penn Water is entitled to obtain from Baltimore Company steam-generated energy in excess of the latter's own requirements up to the limit of its available generating capacity. This contract, according to its terms, is to continue in force until midnight, April 22, 1980.

Pursuant to the provisions of the supplemental agreement of June 1, 1931, as modified by an agreement of September 29, 1939, Baltimore Company undertakes to pay, on the basis of a formulated power bill, all of Penn Water's operating expenses plus a specified return.

The reference to Penn Water's entitlement from Safe Harbor relates to a fifty-year agreement of June 1, 1931 wherein Safe Harbor agreed with the Baltimore Company and Penn Water (and the latter *inter sese*) that in return for a combined annual payment (in monthly installments which would yield to Safe Harbor, after operating expenses (including taxes and depreciation), a specified rate of return, the latter companies should be entitled to all of the capacity and energy available from the former's [8] six-unit development in the ratio of two-thirds (to Baltimore Company) and one-third (to Penn Water).[8] The foregoing contracts with their amendments are sometimes referred to as system foundation contracts.

8. The payment constituting the obligation of Baltimore Company and Penn Water is prorated between those parties in the ratio of their capacity and energy entitlements (the contract proportion) and remains unaffected by

Following a subsequent long-term agreement between Baltimore Company and PEPCO, of June 16, 1932, Penn Water also contracted with Baltimore Company and Safe Harbor to deliver or have delivered to PEPCO at the latter's Takoma Park (Md.) Substation, such power and energy as might be delivered to Penn Water for the purpose, and stipulated that the Takoma Park Substation should become an additional delivery point under the agreement of June 1, 1931. This interconnection was designed to provide PEPCO with firm peak service, additional power and energy needed by the Railroad at Benning (D. C.), and hydro and steam economy flow interchange, as well as to provide Baltimore Company with steam economy flow and to enable Baltimore Company and PEPCO to coordinate their system planning and investments in generating and transmission facilities.[9]

[9] Electric power and energy sales to the Railroad are made under a contract dated September 2, 1931, by and between the Railroad, Baltimore Company, Penn Water, and Safe Harbor, PEPCO becoming a party under a supplement of August 15, 1934. The contract covers delivery of the Railroad's entire 25-cycle, single phase, electrification requirements on the latter's main-line from Perryville (Md.) to Washington (D. C.), on its Philadelphia division between Thorndale (Pa.) and Harrisburg (Pa.) and on its Columbia and Port Deposit line from Columbia (Pa.) to Perryville (Pa.), together with the furnishing of certain special equipment and facilities. This contractual supply is delivered at Conestoga Substation (Safe Harbor), Fish-

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the amount of power actually received by either. Safe Harbor later agreed (1939) to install an additional 25-cycle generator and cable to Conestoga Substation, to provide for increased power and energy requirements of the Railroad, the entitlement of two-thirds to Baltimore Company and one-third to Penn Water being applied to the capacity and energy to be available from this unit. Safe Harbor is committed not to contract to supply power and energy from additions to its plant to any other party without the consent of Baltimore Company and Penn Water.

9. The agreement between Baltimore Company and PEPCO is for a term ending September 30, 1960. By supplement of August 15, 1934, the tie-in capacity between the two companies was increased (for greater emergency assistance and increased volume of economy flow interchange) by an additional interconnection over the Railroad right-of-way.

ing Creek (Pa.), Conowingo (Md.), Perryville (Md.), and Benning (D. C.), under the specific terms of the contract and subsequent designation.[10] The Railroad provides transmission facilities between Perryville and Baltimore for supply of its lines south of the Baltimore tunnels and a part of a 110 kv circuit between Baltimore and Benning for the general transmission use of the supplying companies, including Baltimore Company and PEPCO. By a later agreement dated June 22, 1938, between the Railroad, Philadelphia Electric Company (Philadelphia Company), Baltimore Company, Penn Water, and Safe Harbor, provision was made for regular and constantly maintained parallel operation through the power transmission lines of the Railroad and connections therewith at Perryville (Pa.) and Thorndale (Pa.),[11] and for the cooperation of the parties in securing flexibility of power [10] supply, the best utilization of single-phase generating capacity available in the systems of the several contracting electric companies, and the shifting of loads.[12]

Penn Water is further committed to supply firm energy to Metropolitan Edison Company (Metropolitan Company) at York (Pa.) in the amount of 20,000 kw, subject to certain provisions for the increase or decrease of the amount and the limitation of hourly amounts;[13] to supply the entire electrical power and energy requirements of Philadelphia Company within a defined territory in the Coatesville (Pa.) area; to supply, under certain conditions, all of Pennsylvania Power & Light Company's (PP&L's) Lancaster 25-cycle and 60-cycle load requirements (Lancaster Co.,

10. Under the contract the Railroad may be billed for "additional load" upon either a metered or computed basis.

11. Philadelphia Company supplies the Railroad in the Philadelphia area.

12. As of the date of this agreement, June 22, 1938, the firm single phase capacity of Philadelphia Company was 134,350 kw and of the other electric companies, 50,000 kw.

13. The 20,000 cannot be adjusted by more than 10,000 kw either way, and the hourly amount of energy Penn Water is required to deliver is equal to the hourly integrated generation at Holtwood and Safe Harbor in excess of 50,000 kwh per hour, multiplied by the ratio of the foregoing firm power obligation to the rated effective capacity of Holtwood and Safe Harbor, less 50,000 kwh, but never less than Metropolitan Company's requirements above the latter's steam line.

Pa., and adjacent areas),[14] coupled with a contingent obligation to meet a limited deficiency in PP&L's firm load carrying capacity for its Harrisburg area and provide a supplementary secondary capacity service.

[11] Penn Water interchanges energy and capacity with Metropolitan Company on a steam and hydro economy basis as well as for emergency purposes; on an emergency basis with Philadelphia Company in the Coatesville (Pa.) area; and on a steam and hydro economy and an emergency basis with PP&L. Under certain flexible provisions of the contract with PP&L, Penn Water may be required to deliver, during times of high river flow, an additional amount of 25-cycle and 60-cycle power and energy equal to 20% of the Lancaster Load requirement, if Penn Water is able so to do.

Finally, on the bases of an interdependent agreement associated with the Railroad parallel operation agreement, already mentioned, Penn Water exchanges with Philadelphia Company through the Railroad's metering points at Perryville (Pa.) and Thorndale (Pa.) energy, on economy (intentional), unintentional, and emergency bases.

Penn Water's foregoing contracts comprise all of those under which there is transmitted and sold the energy generated by Penn Water or purchased by it, or otherwise acquired by either of the Respondents (Penn Water and Transmission Company) in this proceeding. While Safe Harbor is a party to several of the contracts, its position in the PP&L and Philadelphia Company contracts is a nominal one,[15] involving a legal technical-

14. Since interconnection of the Lancaster area with PP&L's main system, during days of low flow, the on-peak obligation may be reduced 20%. The supply of 4,000 volt service for a portion of the territory of the former Pioneer Electric Light Company is billed separately. What is here set forth is Penn Water's obligation under what is known as Option A.

15. Safe Harbor is not a contract payee under the Railroad agreement, nor under the Coatesville and Lancaster agreements wherein Penn Water is a party with the Philadelphia Company and PP&L respectively; while a party to the parallel operation agreement between the Railroad, Philadelphia Company, Baltimore Company, and Penn Water, no rates as to it are there involved. It is no longer a party to the York contract with Metropolitan Company. Indeed, the Coatesville and Lancaster agreements provide that Philadelphia Company and PP&L, respectively, may deal with Penn Water in all respects as if it were the only party contracting with it.

ity,[16] which has no bearing or effect upon the operations of the system.

[12] JURISDICTION.

Respondents challenge this Commission's authority to regulate any of Penn Water's rates [17] under provisions of Part I which deal with "licensees'" rates, or Part II which deal with those of "public utilities". Certain aspects of that challenge permit a simpler discussion if the Commission's authority under Part II is considered first.

Authority Under Part II.

One of Respondents' contentions is that the Commission is without authority under Part II "because its conditional authority under Part I of the Act is exclusive of its authority under Part II." In substance, the argument is that a Part I "licensee" cannot be a "public utility" under Part II, and that a licensee's interstate wholesale rate may be regulated by the Commission, if at all, only under Part I. The essentials of this argument we considered and rejected in *Safe Harbor Water Power Corporation* (5 FPC 221, 235-237). Our views expressed there remain unchanged and need not be repeated here. We turn then to consider the remaining aspects of the question whether the provisions of Part II apply here.

The rate provisions of Sections 205 and 206 of Part II apply only to a "public utility", defined in Section 201 (e) as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part." Such facilities are specified in Section 201 (b) as facilities for "transmission of electric energy in [13] interstate commerce" or for "sale of electric energy at wholesale in interstate commerce", with certain exceptions which need

16. Involving possible savings in the Pennsylvania gross receipts tax.

17. Transmission Company has no separate rates. See *supra*, p. 1.

not be discussed here beyond reiterating that the provision of 201 (b) relating to State authority over the exportation of hydro electric energy is inapplicable. *Safe Harbor Water Power Corporation,* 5 FPC 221, 235. Section 201 (c) provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof * * *." Section 201 (d) defines a "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale."

We must determine, therefore, whether the facilities owned and operated by Respondents bring them within these definitions. The record shows that Respondents own transmission facilities which transmit electric energy from Pennsylvania to Maryland and from Maryland to Pennsylvania, that such electric energy included energy generated in each of such States and consumed outside thereof, and that these facilities are used to effect the sale of electric energy by Penn Water to Baltimore Company. The facilities in Pennsylvania are owned by Penn Water and in Maryland by Transmission Company. Among these facilities are two 220 kv lines from near the Safe Harbor plant to points near Baltimore Company's Riverside and Westport substations and PEPCO's substation at Takoma Park, Maryland, and a 66 kv line from Penn Water's Holtwood plant to Transmission Company's Highlandtown substation at Baltimore, Maryland, where interconnection is made with the facilities of Baltimore Company. Energy generated at the Safe Harbor plant, the Holtwood plant, or obtained by interchange with Penn Water's Pennsylvania customers, is transmitted from within Pennsylvania over these facilities and consumed outside thereof by customers of Baltimore Company and by customers of PEPCO.

[14] Beyond any doubt, the foregoing facilities of both Respondents are "transmission" facilities of the type prescribed in Section 201 (b), and make it unnecessary to enumerate additional facilities of the same nature. It is

equally clear that those facilities are also used for sales by Penn Water for resale.[18]

Whether such sales are sales "in interstate commerce", however, presents a different problem. Nowhere does the Act define what constitutes a "sale in interstate commerce". Nor is there any provision which makes the meaning of that term dependent upon identification of all or a designated percentage of the energy sold, as energy flowing interstate. Congress thus left for determination by the Commission and the courts whether a particular sale is one "in interstate commerce". Although conceding this to be so, Respondents deny that Penn Water's sales to its Pennsylvania customers can be considered sales in interstate commerce because each includes varying amounts of energy which does not cross the State line.

The central fact disclosed by the record about Penn Water's sales in Pennsylvania is that they are not sales of the output of Penn Water's own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part. Penn Water's plant contributes to that output, such contribution, like those of Safe Harbor and Baltimore Company, being determined by the best use the system can make of the plant's capabilities.

[15] The record shows that this system operates in the following manner. The Safe Harbor plant generates both 60-cycle energy and 25-cycle single phase energy.[19] The 60-cycle energy is transmitted to Baltimore and to a point near the Takoma Park, Maryland, substation on the two 220 kv lines referred to above and, at times, energy generated by Baltimore Company or PEPCO is transmitted on

18. Such sales are Penn Water's sales to Baltimore Company and to Penn Water's Pennsylvania resale customers. The sale to the Pennsylvania Railroad is not a sale "for resale". Accordingly, our discussion at this point relates only to Penn Water's sales to its Pennsylvania resale customers and to Baltimore Company.

19. The reference to energy of a particular frequency and phase (*e. g.*, "25-cycle single phase") is intended as a convenient method of designating the frequency (cycles per second) at which the energy is transmitted and phase at which the particular circuit is designed to be operated.

these lines in the opposite direction to Safe Harbor. The 60-cycle energy thus received from Maryland, together with that generated at Safe Harbor, is delivered to Penn Water near the Safe Harbor plant and is transmitted by Penn Water over its two 66 kv circuits (Nos. 692 and 693) to Donegal Tap (Pa.) and to Lehman Farm (Pa.) in part for delivery to PP&L's lines and in part for delivery over two 66 kv circuits (Nos. 15 and 16) to Holtwood. The energy so delivered at Holtwood is sometimes, in whole or in part, energy received at Safe Harbor from Baltimore and Takoma Park, Maryland. It is thereafter delivered, with energy ~~operated~~ generated at Holtwood (hydro and steam), to Philadelphia Company (Coatesville, Pa.), Metropolitan Company (York, Pa.) or PP&L (Lancaster, Pa.), via Circuit No. 18. At times it is also in part converted to 25-cycle three phase energy and transmitted and delivered to PP&L (Circuit No. 3) or to Baltimore Company at Highlandtown substation, or to both. Some of the 60-cycle energy received at Safe Harbor from Maryland over the 220 kv circuits is at times converted at Safe Harbor to 25-cycle, singe phase, for Railroad use.

The 25-cycle single phase energy generated at Safe Harbor, and that available through its frequency changers, is delivered at Penn Water's adjacent Conestoga substation, from which it is re-delivered to [16] the Railroad for railroad purposes or for interchange at Thorndale (Pa.) with Philadelphia Company, or is transmitted over Respondents' 132 kv four circuit line for delivery to the Railroad for railroad purposes at Fishing Creek (Pa.), Conowingo (Md.) and Perryville (Md.) or for interchange at Perryville with Philadelphia Company.

Penn Water generates both 60-cycle energy, and 25-cycle three phase energy at its Holtwood plant. The 60-cycle energy, and energy from other system sources, is delivered to Philadelphia Company, Metropolitan Company or PP&L or is converted into 25-cycle three phase energy. Part of the Holtwood 60-cycle energy at times is delivered

through circuits Nos. 15 and 16 to PP&L at Lehman Farm or Donegal Tap; part is at times transmitted to Safe Harbor where it is further transmitted with other energy on the 220 kv lines to Baltimore or Takoma Park, Maryland; and part is at times converted to 25-cycle single phase energy at Safe Harbor and delivered to the Railroad facilities as described above.

Penn Water's 25-cycle generation is delivered to PP&L, some is at times converted to 60-cycle at Holtwood, and the remainder is transmitted over the four 66 kv circuits to Transmission Company's Highlandtown substation at Baltimore where it is delivered to Baltimore Company. The Highlandtown substation at times also receives from Baltimore Company a smaller amount of 25-cycle energy which is transmitted to Holtwood where it is delivered to PP&L or is converted to 60-cycle energy and delivered by Penn Water, to Safe Harbor or to the Pennsylvania customers.

It can be seen from the foregoing description of the operations of the facilities of Penn Water, Transmission Company, Safe Harbor and Baltimore Company that electric energy from the numerous system sources is available for consumption at any point on their combined facilities. Their power resources and transmission facilities are thus operated as an integrated and coordinated electric system, and all of Respondents' [17] facilities are integral parts of that system. The system foundation contracts referred to above (*supra*, pp. 7-8), governing the operation of the system, were designed to facilitate this completely integrated operation of system generating and transmitting facilities. That purpose found expression in the Supplemental Agreement of June 1, 1931, Article VIII of which reads in part as follows:

> "It is the intent among other things of this long term agreement to encourage the maximum cooperative utilization of the power and energy entitlements

and resources and other facilities of the parties hereto to the end that the joint use of their property and equipment shall give the greatest practical benefit to the public, and that all duplication of investment, and all unnecessary operating and maintenance costs, shall be avoided except such as would contribute toward the maintenance and improvement of the high standard of service rendered. The parties hereto shall cooperate to the fullest extent in the selection of the most suitable equipment in the co-ordination of their investment programs for additional generating capacity, transmission and tie-in facilities, etc., and shall so conduct their operations that economic interchange of power and energy during the different hours of the day, the seasons of the year, and over more prolonged periods, shall be encouraged in every possible way."

Contributing to the accomplishment of complete integration and pooling of the system's power resources are the provisions for over-all compensation to Penn Water and Safe Harbor without regard to the amounts delivered or the points at which delivery is made.

As a result, the direction of energy flows crossing the Pennsylvania-Maryland State line is governed principally by the volume of river flow. In general the flow of energy is south from Pennsylvania toward Maryland at all times during the spring months when the river is high. During the rest of the year the practice is to generate energy at the hydro plants of Penn Water and Safe Harbor so as to assist Baltimore Company in carrying its peak loads during the day, but at other hours and during weekends to stop hydro generation so as to allow the [18] ponds to refill. At these times the flow of energy tends to be to the north. However, the direction of the flow on the lines crossing the State boundary may change frequently according to the needs of the consumers in Pennsylvania or Maryland.

In this manner energy crossing the State boundary, with other system energy, is used to fulfill system require-

ments. There result times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Energy flows in, across, and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.

It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary. The very purpose of the system foundation contracts was the elimination of artificial barriers, such as State boundaries. In the making of sales of system energy, such as those by Penn Water to its Pennsylvania utility customers, no distinction is made between energy crossing a State boundary and that which does not. Likewise, title to energy flowing on the system is of no significance among the companies comprising the system since they physically function as one enterprise and since the compensation features of the system contracts are so designed as to render considerations of title unimportant.

In the light of the foregoing facts, each of Penn Water's sales in Pennsylvania is clearly a system transaction of a character wholly [19] interstate even though at times it involves varying amounts of energy never crossing the State boundary, sometimes unmixed and sometimes mixed with out-of-state energy. In short, Penn Water is selling interstate system energy to purchasers outside the system. Such sales are sales "in interstate commerce".

The sale by Penn Water to Baltimore Company is also "in interstate commerce", but all of the energy thus sold crosses the State line. This latter sale is an intra-system transaction between two integral corporate parts of the system enterprise, which transaction is ancillary to the con-

summation of sales of system energy by Baltimore Company to purchasers outside the system, such as PEPCO, or in enabling Baltimore Company's use of that energy for delivery and sale to its resale customers.

The principles by which the foregoing conclusions are reached do not differ from those which must be applied in determining the character of Safe Harbor's sale of its output. With respect to that sale, the United States Court of Appeals for the Third Circuit has pointed out that Safe Harbor operates "as part of a large integrated interstate electric system" and sells all of its electric output, which "must be treated as an integrated whole", to "its two parent companies", Baltimore Company and Penn Water (*Safe Harbor Water Power Corporation v. Federal Power Commission*, 124 F. 2d 800, 802-803, 807). The energy sold by Safe Harbor, like that sold by Penn Water to its Pennsylvania resale customers, includes varying amounts of energy which never crosses a state line. All are nevertheless sales "in interstate commerce". And, incidentally, Safe Harbor's sale is like Penn Water's sale to Baltimore Company in that both are intra-system transactions.

[20] From what has been said, it clearly follows that facilities owned and operated by Respondents include facilities used for "the transmission of electric energy in interstate commerce" and for "the sale of electric energy at wholesale in interstate commerce". Each Respondent is thus a "public utility" within the meaning of that term as used in Part II. It is also evident that Penn Water's sales to its Pennsylvania resale customers and its sale to Baltimore Company are all sales "subject to the jurisdiction of the Commission" within the literal terms of Sections 205 and 206.

Respondents nevertheless contend that the Commission is without authority over the rate charged for the sales to PP&L, Philadelphia Company and Baltimore Company, claiming that such rates "are joint rates over which this

Commission has no jurisdiction".[20] This claim apparently rests upon the fact that Safe Harbor is a nominal party to Penn Water's contracts with PP&L and Philadelphia Company and upon the coordinated nature of operations of the integrated system. Both points may be conceded, but it does not follow that the rates involved are "joint" in any sense which removes them from this Commission's regulatory jurisdiction in this proceeding. In the first place, Safe Harbor sells its entire output to Penn Water and Baltimore Company and having received payment therefor constituting its entire revenue, it cannot sell any part of it to Penn Water's Pennsylvania customers. And while the [21] system operations are coordinated, the compensation features of the contracts by which Safe Harbor and Penn Water sell to Baltimore Company clearly refute any suggestion of "joint rate". Indeed, the record is replete with evidence, much of it supplied by Penn Water, which shows this "joint rate" contention to be wholly without substance.

Finally, Penn Water contends that its rates apply not only to energy but, indivisibly, to capacity services, transmission services, frequency control, power-factor cooperation, use of special facilities, and other services, as well as energy, and that this Commission's jurisdiction is limited to rates and charges relating only to the sale of "energy" in a strictly limited, technical sense. But all of these other so-called services are usual incidents of the wholesale sale of energy and many of them involve no segregable costs of service. The rates here involved, however they may be attributed to energy, capacity, and the other incidents referred to, are clearly within the scope of the statutory reference to "rates and charges * * * for or in connection with the * * * sale of electric energy subject to the jurisdiction of the Commission" (Section 205 (a)) and to "any

20. Significantly, Respondents do not contend that Penn Water's rate to Metropolitan Company is "joint". Though Safe Harbor, which was formerly a nominal party to that contract is not now a party, the real situation there is precisely the same as that involved in Penn Water's contracts with PP&L and the Philadelphia Company where Safe Harbor is a nominal party.

rule, regulation, practice or contract affecting such rate, charge, or classification" (Section 206 (a)). We perceive nothing in Respondents' sales for resale to take them outside the scope of the regulation provided by Congress.

Authority under Part I.

Respondents challenge the Commission's authority under Part I, claiming that the facts necessary to exercise of our jurisdiction under [22] Section 19 or Section 20 are not shown of record.[21] Since Section 19 deals with intrastate rates, our attention here may be confined to Section 20. For we have already seen that Penn Water's operations are all integral activities of the unified interstate systems, and its sales are sales in "interstate commerce".[22]

Respondents argue that this Commission has no authority over its interstate wholesale rates, absent a finding that the States [23] directly concerned—Maryland and Pennsylvania—are "unable to agree" on those rates, and that such a finding cannot be made on the record. However, the record shows that the Commissions of both States actively intervened, and during the course of such participation and in the briefs of their respective counsel, clearly demonstrated that their positions are irreconcilable and that they are "unable to agree." Accordingly, we expressly find that the States are "unable to agree."

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21. Respondents apparently take the position that Penn Water must be treated as a licensee under Part I. Our order requiring Penn Water to apply for a license was sustained on review (*Pennsylvania Water & Power Company* v. *Federal Power Commission*, 123 F. 2d 155, *certiorari* denied 315 U. S. 806). Though no license has yet been issued (see *Re Pennsylvania Water & Power Company*, 4 FPC 426; *idem*, 4 FPC 500), it is entirely proper that Penn Water be treated as a licensee for rate-making purposes.

22. We confine our inquiry concerning jurisdiction under Part I to Penn Water's sales to its Pennsylvania resale customers and to Baltimore Company. Although Penn Water's retail deliveries to the Pennsylvania Railroad in Pennsylvania are deliveries in interstate commerce they are made under a contract which provides for deliveries in both Pennsylvania and Maryland by Penn Water and Baltimore Company. By a separate agreement among themselves, to which the Railroad is not a party, Penn Water and Baltimore Company have agreed upon a division, at the State boundary, of their deliveries, and a division of the revenue received. Nevertheless, the record here provides an adequate basis for a determination of Penn Water's costs in performing the service it renders under the contracts. See *infra*, p. 166.

Is Section 20 Repealed by Implication? Here, as in the Safe Harbor proceeding (5 F. P. C. 221), the contention has been advanced that a Part I licensee cannot be regulated under Part II. We have found that Penn Water must be treated as a Part I "licensee" for rate-making purposes, and that it is a "public utility" under Part II. Accordingly, if Section 20 be construed to confer upon the states a priority of jurisdiction over the interstate wholesale rates of a licensee-public utility, the conflicting part of Section 20 must be considered repealed by implication, or it must be given a construction avoiding conflict. We reaffirm and need not repeat our discussion of this problem in the Safe Harbor proceeding (5 F. P. C. 231, 239-243). Here, as there, we conclude that whether Section 20 may be given an interpretation avoiding conflict (p. 242)

> "* * * or whether the conflicting part of that section be deemed repealed by implication, the finding that the States are unable to agree is not a necessary condition precedent to our authority under that section, for the rates here in question, being interstate wholesale rates held beyond the regulatory power of the States in the *Attleboro* case, *supra*, the condition of section 20 would be inapplicable. Our jurisdiction, therefore, would not be dependent upon our finding that the States are unable to agree."

[24] DUE PROCESS.

On reviewing the entire record in this proceeding we think it is clear that Respondents have had a fair hearing on adequate notice.

The scope of the subjects and issues involved were clearly set forth in the Commission's orders instituting and enlarging the investigation herein and fixing the date of hearing. The detailed position of the Staff with respect to these subjects and issues, as developed during the course of the Staff's investigation, were set forth by Staff's counsel in his opening statement, and at other times during the

course of the hearing. There is not the slightest evidence that Respondents were unable to prepare their case because of any alleged vagueness in the specification of issues, and it may be noted that not a single witness presented by them had to or did condition his testimony upon what the position of the Staff might or might not be.

Nor were Respondents deprived of an adequate opportunity to present their evidence or to cross-examine adverse witnesses. Respondents' counsel had from 6 to 11 months, after direct testimony on Staff's case in chief, to prepare cross-examination of Staff's witnesses, and from 1½ weeks to 1 month, after service of Staff's prepared rebuttal testimony, to prepare cross-examination with respect thereto. Further, counsel had from 2 weeks to 11 months, after the date Staff witnesses left the stand, to prepare testimony and evidence in rebuttal of Staff witnesses, as well as ample time in which to prepare and present evidence rebutting Staff's rebuttal.

The exclusion of evidence of reproduction cost, as well as cost in present dollars and cost of a substitute plant, was entirely proper on basis hereinafter stated. Respondents fail to show that they have been prejudiced by any substantial error in any ruling of the Examiner excluding evidence.

The record in this proceeding, therefore does not support Respondents' claim of not having had ample notice and not having had a fair trial.

[25] ELECTRIC PLANT—RATE BASE.

In the determination of a rate base there is involved the investment in property used and useful in public service, consideration of accrued depreciation, and an allowance for working capital.

Evidence was received in this proceeding as to Respondents' electric plant in service as of December 3 (sic) [31], 1945, both as reclassified by Respondents in their original cost studies and as adjusted by the Staff during

the course of the Staff's examination of Respondents' accounts and records in preparation for the hearing herein. Evidence was received later in the proceeding, in the form of exhibits, projecting the foregoing amounts of electric plant in service to December 31, 1946.

Respondents also offered evidence as to (1) the cost of reproducing their properties as of December 31, 1945, (2) the cost as of the same date of producing a modern substitute plant therefor, located at the same place and capable of rendering the same service as Respondents' present facilities, and (3) the original investment in Respondents' properties stated in terms of the purchasing power of the dollar in 1945.

The evidence embraced in the foregoing offers was properly excluded by the Examiner. None of this excluded evidence is necessary for rate making purposes and none of it would aid the Commission in the determination of just and reasonable rates. Further, as all of such evidence was offered to show "fair value" in excess of actual [redacted]itimate original cost, and consequently in excess of "net investment", such evidence, had it been received, would be useless for rate making purposes [26] under Part I of the Act by express provision of Section 20 thereof.[23]

Electric Plant in Service.

Respondents' Electric Plant in Service[24] as of December 31, 1945 totalled (per books) $38,584,232.13. The Staff proposes the exclusion of a net amount of $5,663,493.90 of this total for rate base purposes leaving an adjusted Electric Plant in Service in the amount of $32,920,738.23. During the course of the Staff's field examination and the hearing proceedings, Respondents conceded certain proposed adjustments in the net amount of $2,208,902.08 leaving in issue a balance of $3,454,591.82. Deducting from this balance $75,722.25 proposed by the Staff for reclassification

23. *In the Matter of Safe Harbor Water Power Corporation* (IT-5914, 1946) 5 FPC 220, 243-244.

24. Electric Plant in Service as used in this opinion embraces Electric Plant in Service and in Process of Reclassification as used in the exhibits in this proceeding.

to Plant Held for Future Use but claimed by Respondents for inclusion as a part of the rate base, the amount considered in dispute at this point totals $3,378,869.57 [25] and is composed of the following items:

[27]

1. Claimed value of McCall Company common stock (par $100) issued allegedly for land and water rights or organization:		
Issued to Hutchinson, 18,840 shares @ $25	$ 471,000	
Issued to Harlow-McGaw, 1,000 shares @ $25	25,000	
Issued to C. D. Pullen, 150 shares @ $25	3,750	
Issued for Organization, 10 shares @ $25	250	$ 500,000.00
2. Claimed value of McCall Company stock allegedly issued to Harvey Fisk & Sons for management services (⅜ of value of 1,875 shares preferred and 17,537½ shares common)		199,570.31
3. Stock issue expense:		
Penn Water stock expense	$ 81,906.59	
Alleged McCall Company bond expense claimed applicable to Penn Water stock exchanged for McCall Company bonds	331,703.15	413,609.74

25. I. e. $5,663,493.90 less $2,208,902.08 less $75,722.25 or $3,378,869.57.

4. Claimed value of 5,000 shares of Penn Water common stock at $60 allegedly issued to Aldred for management services (11/1/08 to 11/1/12, prorated to period 11/1/08 to 10/1/11)		218,750.00
5. Interest during construction by McCall Company and Penn Water		1,201,368.57
6. Expenditures during McCall Company's "cessation period"		143,981.46
7. Promotion expense, Penn Water		29,601.59
8. Credit for property transferred by McCall Company		37,063.98
9. Profit on property sold by Penn Water		119,940.20
10. Flashboard development expense		44,961.06
11. Roller dam investigation expense		4,793.91
12. Charges to flowage basin account:		
Period 1910-1924	$150,346.37	
Period 1925-1936	27,283.37	177,630.24
13. Survey of storage reservoir sites		12,420.77
14. Cost of land acquired from affiliate		24,151.83
15. Cost of defending title to Mill tract		1,427.42

16. Conowingo backwater litigation expense	39,301
17. Expense incurred on transmission line built by others	12,459
18. Expense incurred on substation built by others	5,668
19. Loss on materials and supplies	13,033
20. Cash not accounted for	130
21. Susquehanna Contracting Company expense	6,621
22. Construction fee charged Holtwood Power Company (Affil.)	50,194
23. Organization expense of Holtwood Power Company (Affil.)	17,875
24. Tower foundations abandoned	3,595
25. Items previously charged to operating expense or to the depreciation reserve	96,116
26. Contribution to Holtwood Church	1,400
27. River coal marketing expense	6,132
28. Value of McCall Ferry Company stock acquired from Hutchinson	(200.0
29. Miscellaneous items in plant account proposed for elimination by Respondents	(2,731.8
	$3,378,869

[28] *Control of the McCall Company and Distribution of its Stock.*

Before taking up the respective items of claimed cost comprising the total of $3,378,869.57 in dispute, consideration will be given to the questions, common to Items 1, 2 and $331,703.15 of 3, above, of whether certain McCall Company stock was distributed in payment for services and properties, as Respondents claim, and of whether Harvey Fisk & Sons, one of the alleged recipients, obtained exclusive control of the McCall Company so that the distribution of the stock to the other principal alleged recipients, after it obtained such control, can be treated as arm's length transactions not subject to the no-profits-to-affiliates rule. As we have recently reiterated, it is incumbent upon the licensee under the Act to show, with respect to property acquired from an affiliate, that the amount it claims as cost was cost to the affiliate, not profit. *Minnesota Power & Light Company,* decided September 2, 1948, Opinion No. 167, Project No. 346, and cases there cited (p. 8, *et seq.,* mimeographed copy); compare *St. Croix Falls Minnesota Improvement Company, et al.,* 3 F. P. C. 3, 27-29 (dissenting opinion).

The project was conceived by Cary T. Hutchinson, who later acted in the capacities as Director and Chief Engineer of the McCall Company. His preliminary and promotional activities covered a four-year period, culminating, in the Spring of 1905, in the completion of financial arrangements for a 155-foot dam (increased in June 1906 to 165 feet), with 50,000 horsepower installed, and the incorporation of McCall Company on April 14, 1905, to construct, own and operate the development. The McCall Company was organized by the merger of two inactive companies previously incorporated by Hutchinson in 1902, and at the outset had the same incorporators, stockholders, and directors as the predecessor companies, all nominees of Hutchinson and his associates.

[29] Financing activities were initiated before the creation of the McCall Company by the formation of a syndicate

managed by H. F. Dimock (Hutchinson's father-in-law) S. R. Bertron (of Bertron, Storrs & Griscom), and Charle F. [T.] Barney (President of Knickerbocker Trust Com pany), and the issuance of a combined prospectus and un derwriting agreement dated March 1, 1905, under which i was proposed to obtain subscriptions to $8,000,000 princip amount of bonds. The original syndicate, after obtainin subscriptions to approximately $4,000,000 of bonds (prin cipally, or entirely by Lee, Higginson & Company and C. A Coffin), enlisted and obtained the aid of Harvey Fisk Sons. Negotiations with the Fisk firm resulted in the issu ance of a bond and stock purchase agreement dated Marc 25, 1905,[26] which set forth the arrangement between th Fisk firm, as "Bankers", and the subscribers, severally However, any arrangement agreed upon between the synd cate members themselves as to control of the McCall Com pany, distribution of its stock, etc., is unknown as ther is no available document which discloses the terms thereo

There was sold at 90 cents on the dollar a total o $8,075,000 principal amount of bonds, including th $4,000,000 of subscriptions [30] obtained by the origina syndicate and kept in force under the March 25th bond an stock purchase agreement. It was expressly provided in th March 25th agreement that the bonds sold thereunder wer subject to Harvey Fisk & Sons' option to repurchase a or any part of them from the original subscribers at th initial sales price (90), unaccompanied by the bonus stock,

26. The March 25, 1905, bond and stock purchase agreement recites part:

"* * * the Bankers (Harvey Fisk & Sons) have been requested a are willing to aid in financing the said Plan to the extent of taking agre ments from the Subscribers for the purchase of bonds and preferred sto of the Power Company, of acquiring the bonds and stocks for delive under such purchase, and of making or procuring the loans hereinaft mentioned;

* * *

"No partnership or joint relation of any kind results from this agre ment, nor do the Bankers assume any fiduciary relation of any kind, any obligation to cause the plan aforesaid to be undertaken or carri out."

. The subscribers to the $4,000,000 subscriptions sold before executi of the March 25, 1905, agreement apparently received a 50% preferred sto

at any time up to one year after completion of construction. This agreement is the only contemporaneous evidence which refers to compensation to be received by the Fisk firm. None of the records of that firm relating to the McCall Company financing are now in existence, and there is no other contemporaneous evidence showing that the Fisk firm either received, or was entitled to, any compensation other than that hoped to be realized through the resale of the bonds at a price above 90.

The issued and outstanding stock of the McCall Company consisted of 50,000 shares of common and 41,165 shares of preferred. On the basis of executed contracts the distribution to be made of those [31] securities was as follows:

	Common	Preferred
Incorporators' Shares	10	
Issued by Susquehanna Contracting Company[28] in exchange for properties:		
Harlow-McGaw[29]	1,000	
Pullen	150	
Hutchinson	48,840	4,000
Retained by Susquehanna Contracting Company for bond subscriptions		37,165
	50,000	41,165

bonus with the bonds, notwithstanding the fact that the March 25th plan provided for and the other subscribers received only a 45% preferred stock bonus.

28. The Susquehanna Contracting Company, a paper company, was organized on June 12, 1905, and the bond and stock purchase agreement of March 25, 1905, under which the bond subscriptions had been sold, together with the rights, obligations and liabilities of the Fisk firm thereunder, except for the Fisk firm's option to repurchase the bonds at 90 (which it retained), were assigned to the Contracting Company upon its formation. The Fisk firm was appointed agent to carry out the Contracting Company's obligations under the March 25th agreement. There is evidence indicating that the purpose of the Contracting Company was to relieve the Fisk firm "as a partnership, from any liability which might result from the financing."

29. Harvey Fisk & Sons and Bertron, Storrs & Griscom executed contracts for the purchase of the Pullen option and the Harlow-McGaw proper-

[32] Respondents claim that the contract for the purchase of Hutchinson's properties was merely the vehicle for distributing 30,000 shares of common and 1,875 shares of preferred stock to Harvey Fisk & Sons (17,537½ shares of common and 1,875 shares of preferred), Bertron, Storrs & Griscom (7,462½ shares of common) and Lee, Higginson & Company (5,000 shares of common). This claim is supported as to Bertron, Storrs & Griscom and Lee Higginson & Company by the investment records of Bertron, Storrs & Griscom which show that firm's receipt of 12,462½ shares of the McCall Company common, of which 5,000 were transferred to Lee, Higginson & Company under date of December 11, 1906, as its commission for the sale of $2,000,000 principal amount of the McCall Company bonds. Beyond this there is no credible evidence to support Respondents' claimed distribution. Further, since the evidence does not indicate the amount of bonds, if any, sold by Bertron, Storrs & Griscom, there is serious question as to whether it was intended that that firm should retain the 7,462½ shares as compensation for services rendered. Respondents' claim must be rejected insofar as it relates to Harvey Fisk & Sons.

On the question of control, likewise, Respondents' claim that Cary T. Hutchinson lost control of the enterprise in the Spring of 1905 to Harvey Fisk & Sons must be rejected. Such credible evidence as there is leads us to conclude that when the Fisk firm came into the financing, after

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ties on April 27th and 29th, 1905. Upon its creation the Contracting Company executed an agreement with the McCall Company providing for the transfer to the latter of the Hutchinson properties, the Pullen option, the Harlow-McGaw properties and $6,400,000 in cash, which cash had already been provided for through the sale of bond subscriptions and a loan agreement. In return, the McCall Company agreed to issue to the Contracting Company $8,483,000 in bonds ($8,075,000 of which had been sold), 41,165 shares of preferred and 49,990 shares of common stock. To place the Contracting Company in position to carry out its agreement with the McCall Company, the contracts previously executed for the purchase of the Harlow-McGaw properties and the Pullen option were assigned to the Contracting Company, which company also executed an agreement for the purchase of Hutchinson's properties for a stated consideration of $750,000 in cash, 4,000 shares of preferred and 48,840 shares of common stock.

half of the bonds had been sold, the original promoters merely opened their ranks to an additional member and that all thereafter shared control of the McCall Company until it encountered financial difficulties and went into receivership.

[33] We think it is clear that during the period from March, 1905, to December, 1908, control was shared by Hutchinson with Bertron, Storrs & Griscom; Lee, Higginson & Company; C. A. Coffin and Harvey Fisk & Sons as a result of a pooling of their interests. For one thing, all of the McCall Company's stock was deposited under a voting trust. The three trustees constituting the voting trust committee were H. F. Dimock, Hutchinson's father-in-law, who had been associated with Hutchinson from the outset, and was president of the McCall Company; S. R. Bertron, of Bertron, Storrs & Griscom, representative of the bankers in the March 1, 1905, financing syndicate; and W. M. Barnum, a partner in the Fisk firm. Thus, each of the three interests was represented in the voting trust committee. In case of a vacancy on the committee, the remaining two members could have appointed a successor.

Additional evidence indicating that each interest shared in control is to be found in the fact that each was represented on the McCall Company Executive Committee, and, as shown by a letter dated January 19 [July 10,] 1907, the management of the Company was in the hands of a committee on which was a member of each of the three banking firms and "also * * * Mr. C. A. Coffin and Mr. H. F. Dimock who has been interested in the project for a number of years."

Moreover, in a letter dated June 22, 1906, from Hutchinson to Dimock, it is disclosed that Mr. Eddy of the law firm of Simpson, Thatcher & Bartlett had asked Hutchinson "what Board of Directors shall be elected at the annual meeting of the stockholders" and Hutchinson had told him "to re-elect the present Board of Directors, with one [34] possible exception." This indication of at least some voice by Hutchinson in the selection of directors

is unopposed by any showing that the Fisk firm controlled the directors.

We find, therefore, that the McCall Company was not controlled solely by Harvey Fisk & Sons, but that control was shared with Hutchinson and the other interests.

[35] *Claimed Cash Value of McCall Company Common and Preferred Stock.*

Respondents claim $1,031,273.46 (comprised of $500,000, Item 1; $199,570.31, Item 2; and $331,703.15, part of Item 3) as the cash value of common and preferred stock of the McCall Company allegedly issued as part consideration for land and water rights and for services performed by the bankers, such claim being based upon asserted cash values of $25.00 and $50.00, respectively, per share for the common and preferred stock.[30]

None of the issued and outstanding stock of the McCall Company was sold for cash. In the absence of market quotations, Respondents' attempt to substantiate the claimed cash values for the stock through statements, prepared in 1938 and 1939, some thirty-four years after the transactions in which the stock was issued, and signed by or attributed to four individuals,[31] not one of whom states that his assigned values represent the "cash value" of the stock in June, 1905, i. e., the date of the transactions in which the stock was issued, and not one of whom ever sold or purchased any of the McCall Company stock at those valuations, or at any valuation.

[36] While Respondents assert that the statements were "legally admissible as secondary evidence" because "of

30. Both common and preferred stock had a par value of $100 per share.

31. Cary T. Hutchinson; Mr. Pliny Fisk, a former member of the Fisk firm; George C. Lee, a former member of Lee, Higginson & Company; and James E. Hopkins, of the law firm of Coudert Brothers. Their valuations ranged from $18.00 to $30.00 per share for the common stock. We do not think Respondents' selection of $25.00 per share for the common stock, used for the purposes of their original cost claim, is supported by such valuations. The $50.00 valuation for the preferred stock is based upon the opinion of Mr. Pliny Fisk, whose firm is the only one claimed to have rendered services for which preferred stock was issued.

the death'' or ''physical incapacity to testify'' of the four individuals, the record contains no showing that Lee and Hopkins were in fact unavailable because of age, health or other reasons. While it is true that Fisk and Hutchinson were dead at the time of the hearing, Respondents made no effort to produce the attorney who obtained the Fisk affidavit and statement attributed by that attorney to Fisk, the attorney who secured Hutchinson's purported cross mark to ''Hutchinson's affidavit,'' or the physician who, though not present at the time, prepared an affidavit to the effect that Hutchinson, who was then at death's door, had the ability to understand the purport of his actions.

As to the Hopkins affidavit, it need only be further stated that he admits therein that he is ''not qualified to place a value on that stock as such * * *.'' Then, too, in the opinion of Respondents' witness Gunn, of the affidavits and statements obtained, Hopkins' affidavit was the least reliable.

Lee, in his affidavit, admits that it was ''difficult'' at that late date to place a value on the 5,000 shares of common stock received by his firm, but nevertheless was of the opinion that his ''firm would not have participated in the McCall Ferry proposition [37] unless they believed their stock compensation has a total value of at least $125,000 * * *. This would make the stock worth $25.00 per share.'' It was Mr. Gardiner Lane, another partner of Lee, Higginson & Company, who was particularly responsible for that firm's financing activities in connection with the McCall Company. What duties, if any, Lee had in that regard is not shown in the record. The fact that Lee was not presented for cross-examination as to many of the vague and indefinite statements contained in his affidavit; that he valued services and assigned that value to stock, instead of determining the ''cash value'' of the stock, makes his opinion unreliable for the purposes of determining the cash value of the stock involved in Respondents' claim.

In his affidavit, Fisk states that his recollection had been ''dimmed'' as a result of the lapse of so many years,

and that "he had taken very little active interest" in the McCall Company enterprise. Fisk valued alleged services and then assigned such value to the stock he thought his firm might have received as compensation therefor, such method proceeding upon the questionable assumption that if the services had a certain value, the stock exchanged therefor had an equivalent value. Moreover, since there is no merit to the contention that the Fisk firm received stock compensation for either financial or management services, Fisk's $50.00 valuation for the preferred stock and $18.00 for the common were arrived at by valuing non-existent services.

[38] In the "Hutchinson affidavit" it is stated that "the common stock should return a dividend of from 2% to 3% of its par value, which would make it worth from $20.00 to $30.00 per share, based on earnings alone." Such a method of valuation, however, not only starts with an unestablished premise, but is contrary to Section 14 of the Act which expressly provides that "net investment shall not include or be affected by * * * prospective revenues." Furthermore, this assertion as to the value of the common stock is at variance with, and effectively refuted by, a letter written by Hutchinson on January 19, 1906, in which he expressed the hope that 150 shares of common stock of the McCall Company which he was giving to his two associates "before long will be worth something."

Because of the importance which Respondents attach to the document referred to as the "Hutchinson affidavit" it is desirable to set forth its history. That document is dated January 13, 1939, and was prepared at the request of Penn Water's Chief Engineer Gunn, who was in charge of its accounting reclassification, and upon the basis of representations made by him to an attorney in Miami, Florida, on or about January 12, 1939 (Hutchinson died about four days later), or within one or two days after Gunn received word in Baltimore, Maryland, of Hutchinson's "very bad health." Upon his arrival in Miami by

plane, Gunn did not confer with Hutchinson,[32] but rather with Hutchinson's [39] personal attorney, Rhinehart, who, on no previous occasion had conferred with Gunn, and had no knowledge of the early history of the Holtwood development. According to Rhinehart's affidavit dated January 14, 1939, he conferred with Gunn "for several days" in Miami; "prepared an affidavit setting forth in detail information which Mr. Hutchinson was in a position to give"; and on January 13, 1939, "conferred with Mr. Hutchinson in his home * * * at which time he read to him the aforesaid affidavit and after due consideration Mr. Hutchinson endeavored to subscribe his name to the instrument; that he was unable to do so, but then and there did affix his signature in the form of a cross mark * * *." Under these circumstances, some measure of the weight to be given the affidavit can be gained from a consideration of the nature of Gunn's information from which the affidavit was written.

On January 9, 1939, less than four days prior to the preparation of the "Hutchinson affidavit", Gunn had addressed a letter to Mr. Pliny Fisk's attorney requesting that the latter attempt to obtain vital data from Fisk,[33] including information as to the "form of compensation" Harvey Fisk & Sons received "for their services"; the manner in which the Fisk firm looked "upon the arrangement through which they became interested in the McCall Ferry proposition", and [40] whether that firm considered "the transaction a purchase of control from the Hutchinson-Dimock interest". In other words, although Gunn had had several previous conferences with Hutchinson, he still had not ascertained the facts with reference to the points mentioned in his letter. Nevertheless there is contained in the "Hutch-

32. Witness Gunn testified that he had previously conferred with Hutchinson on several occasions with respect to the early history, etc., of the project. Gunn had no "personal knowledge whatever of McCall (Company's) construction nor, indeed, any of the events in the history of the Holtwood Company prior to 1930."

33. In his affidavit dated December 28, 1938, twelve days before, Fisk had stated that he was "unable at this date to give an exact statement of the total compensation to my firm."

inson affidavit" the categorical statement that "the bankers were to receive 30,000 shares (of common stock) and that the remaining shares * * * were to be given Affiant * * *."[34]

[41] As further support for the claimed cash value of the stock, Respondents rely upon the testimony of witness Uhl who expressed the opinion that the fair market value of the properties required for a dam with a crest elevation of 155 feet was $3,300,000 as of March 1, 1905. That valuation was based entirely upon engineering factors designed to reflect power site value and had no relation to cost. It is the type of valuation consistently held by the Commission and the courts to be of no probative value in determining the cost of a project (*Alabama Power Company v. McNinch*, 94 F. 2d 601, 606-609, 614-616; *Alabama Power Company v. Federal Power Commission*, 128 F. 2d 880, cert. den. 317 U. S. 652; *Alabama Power Company v. Federal Power*

34. In his letter dated January 9, 1939, Gunn enclosed a narrative statement he had prepared covering "our story of Harvey Fisk & Sons' connection with the McCall Ferry development." He explained that "Because many essential facts in this story are not now available, we have found it necessary to draw freely upon suppositions and conjectures." The following comparison of excerpts from this narrative statement and an excerpt from the "Hutchinson affidavit" reveals the extent to which Gunn's tentative "story" crystalized into a categorical statement of fact within the brief span of one or two days although apparently he had obtained no further information:

Narrative Statement Enclosed in Letter dated 1/9/39

"From an analysis of the material in our possession, *it appears* that the Hutchinson group not only gave up their syndicate plans but also had to surrender control to Harvey Fisk & Sons. *We have been unable to determine how this control was actually exercised.*

* * *

"* * The fact that these shares came from the 18,840 block *is the basis for the deduction* that this block of stock was owned by the Hutchinson interests. *It would, therefore, appear* that the certificate for 30,000 shares representing 60% of the common stock *probably* went to the Bankers. * *" (Italics supplied)

Hutchinson's Affidavit dated 1/13/39

"* * the Fisk firm * * insisted as consideration for its efforts that a *majority* of the common stock of the proposed development corporation be issued to Harvey Fisk & Sons, or its nominees. Affiant recalls that of the 50,000 shares of common stock to be issued under the * * plan, the bankers were to receive 30,000 shares and that the remaining shares * * were to be given to the Affiant * *." (Italics supplied)

Commission, 134 F. 2d 602, 607), and is entitled to no weight.

Not only have Respondents not sustained the claimed cash values of $25.00 and $50.00, respectively, for the common and preferred stock, but it is clear that the stock could have had no cash value at all. The McCall Company was a newly created company. No contracts for the sale of power [42] had been obtained. The plans and specifications for the development had not been perfected. Not even the exact location of the dam had been determined. Moreover, because the development was a pioneer project, was in fact the first attempt in the United States to erect a hydroelectric project of its type, it was naturally viewed more critically by the investing public than would be the case today.

Contributing to the lack of a cash value for the stock was also the fact that the development involved a large initial investment and heavy prior charges for bond interest which dimmed any immediate prospect for dividends on the stock—particularly on the common stock. Furthermore, the fact that the initial syndicate encountered difficulties in disposing of the prior lien bonds at 90 with a 50% preferred stock bonus, necessitating calling on the Fisk firm for assistance, clearly indicates that the stock could not have been sold for cash.

Further demonstration of the fact that the stock had no cash value is found in the testimony of J. H. Harlow [35] in a condemnation proceeding in 1907 to the effect that the value of the common stock "was practically nothing; you might call it anything you like, it is common stock and may be a long time before it has any value." He had previously testified in the same proceeding that the common stock "has not any market value yet."

[43] Since we conclude that neither the common or preferred stock had any cash value in 1905, the aggregate cash

35. Of the Harlow-McGaw interests which had assembled a large part of the lands ultimately used for this development and had sold it to the McCall Company for bonds and stock of that company and cash.

value claim of $1,031,273.46 must be disallowed. However, because there are several additional grounds for the disallowance of most of the claimed cost sought to be established by the use of that cash value, the individual amounts will now be considered.

[44] a. *Claimed Cash Value of Stock Allegedly Issued to Hutchinson as Compensation for Properties.*

In addition to $750,000 cash paid to Hutchinson under the contract dated June 14, 1905, for his 2,896.54 acres of land and water rights, Respondents contend that $471,000 should be allowed in the rate base as actual legitimate original cost of such land and rights, representing the claimed cash value of 18,840 of the 48,840 shares of the McCall Company common stock issued under that agreement. Since, as already shown, the stock then had no cash value, this claim cannot be allowed. But even assuming, *arguendo,* it had a cash value, the claim would still have to be disallowed.

A cost estimate covering the project, prepared by Hutchinson himself on December 18, 1905, after the transfer of his properties to the McCall Company, lists the cost to McCall Company of his properties at $750,000. Other credible evidence is to the same effect and the March 25, 1905, financing plan provided that the McCall Company "bonds and stock" were to be issued, among other things, "for all *profits* in connection with the bringing together and turning in" of properties. Hutchinson was, as we have shown, at all times in control or sharing control of the McCall Company. Under the Commission's no-profits-to-affiliates rule such profits are not actual legitimate original cost since they did not arise in an arm's length transaction and there is no showing of cost incurred by Hutchinson in excess of the $750,000 cash payment (*Pennsylvania Power & Light Company v. Federal Power Commission,* 138 F. 2d 445, 450, cert. den. 321 U. S. 798; *Niagara Falls Power Company v. Federal* [45] *Power Commission,* 137 F. 2d 787, 792-795, cert. den. 320 U. S. 798; *Puget Sound Power & Light Co.*

v. Federal Power Commission, 137 F. 2d 701, 703; *Alabama Power Company v. Federal Power Commission,* 134 F. 2d 602, 609).

While the staff did not question any portion of the $750,000 cash paid to Hutchinson, which was apparently intended as compensation for all of his efforts, expenditures and obligations, it appears that Hutchinson paid $155,000 for the half (approximately) of his properties which he had acquired from York Furnace Power Company and which he transferred to McCall Company under the June 14, 1905, agreement. While the price he paid for most of the parcels comprising the other half is not shown, it is reasonable to assume from the known prices paid for a few of those parcels that the cost thereof was less than, or at most did not exceed, the $155,000 paid for the York Furnace properties, which would make the total price of all of his properties not more than $310,000. This would leave $440,000 of the $750,000 cash paid to Hutchinson to cover his other expenditures and compensation for his efforts.

Furthermore, not all costs of such efforts would be properly includible here. Merely because Hutchinson incurred expenditures in connection with his promotional and other activities does not mean that they all constitute proper project costs. Thus, such cost as he incurred in connection with his financing activities would be disallowable, in view of the 6% interest allowance hereinafter made (*Northern States Power Co.,* 1 FPC 597, 600). Moreover, expenditures made by Hutchinson in his unsuccessful efforts to secure the enactment of legislation [46] favorable to his promotional plan are likewise disallowable (*Northern States Power Company, supra,* at p. 337). However, there is no means of determining at this late date the aggregate amount and exact nature of all of Hutchinson's expenditures. For this reason, and in order to be abundantly fair to Respondents, we find that a reasonable allowance for actual legitimate cost of this item is $750,000.

b. *Claimed Cash Value of Stock Issued to Harlow-McGaw and Pullen.*

Inasmuch as the McCall Company stock had no cash value when issued, the claim of $28,750 for 1,150 shares of common stock of that company issued under contracts dated April 27th and April 29th, 1905, to the Harlow-McGaw interests (1,000 shares) and C. D. Pullen (150 shares), respectively, as further consideration for lands and rights owned by them, in addition to $210,000 cash and $225,000 cash value of bonds paid to them and not questioned by the staff, must be disallowed.

c. *Claimed Cash Value of Incorporators' Shares Acquired by Hutchinson.*

The McCall Company was formed in April, 1905, by the merger of Hutchinson's two inactive companies, i. e., The Hillside Water and Power Company and Susquehanna Water and Power Company, with ten shares of the McCall Company common stock being given Hutchinson in exchange for the stock of the merged companies. The claimed cash value of this stock, $250.00, has been classified by Respondents in Account 301, as Organization Expense.

Even if the stock had had a cash value, the issuance of the stock was not an organization expense incurred by the merging companies. [47] Moreover, it is reasonable to conclude that the $750,000 payment Hutchinson received for his properties covered all costs previously incurred by him, including the cost of incorporating the predecessor companies. For these reasons, the $250.00 may not be allowed as part of the rate base.

d. *McCall Company Stock Allegedly Issued to Harvey Fisk & Sons for Management Services.*

Respondents contend that Harvey Fisk & Sons, following execution of the March 25, 1905, financing plan, rendered both banking and management services to the McCall

Company. For the alleged management services Respondents claim an amount of $199,570.31, equal to three-eighths of the value Respondents claim for 1,875 shares of preferred and 17,537½ shares of common stock of the McCall Company. The other five-eighths portion of the stock (as hereinafter shown in connection with the amount of $331,703.15 (part of Item 3) claimed as Penn Water stock issue expense) is claimed as compensation paid to the Fisk firm for banking services.[36]

[48] As has been shown, not only did the stock have no cash value when issued, but the claimed distribution thereof to the Fisk firm has not been sustained. It is hereinafter further shown that there is no basis in the evidence for the contention that the Fisk firm rendered management services. But even assuming, *arguendo,* (a) a cash value for the stock, (b) issuance of the stock to the Fisk firm, and (c) rendition of the alleged services, allowance of any portion of the claim either for management or banking services, in the absence of a showing of cost to the Fisk firm, would do violence to the no-profits-to-affiliates rule. This is so irrespective of whether the Fisk firm shared control of McCall Company with other syndicate members, as herein found, or exercised sole control over that company, as alleged by Respondents.

Neither the March 25, 1905, financing plan nor any of the other contemporary evidence of record supports the contention that the Fisk firm managed McCall Company. In fact, the financing agreement provided that the Fisk firm was not even obligated to "cause the * * * plan to be undertaken or carried out." That agreement further provided that the bonds sold thereunder were subject to the Fisk firm's option to repurchase all or any part thereof at

[36] 36. The division between banking and financial services is based upon statements contained in the Fisk affidavit that the value of his firm's banking services was at least $250,000, and his firm's management services was not less than $150,000. It is to be noted, however, that the amount of $199,570.31 claimed for management services exceeds by more than $49,000 the estimate placed thereon in the Fisk affidavit, and such excess lacks any color of support in the Fisk affidavit.

the initial sales price (90), unaccompanied by the bonus stock given with the bonds, at any time up to and including one year after completion of construction, it apparently being contemplated that in the event the development had by that time proved successful, the bonds might then be repurchased and resold by the Fisk firm at a profit. In the absence of evidence indicating to [49] the contrary, it is entirely possible that it was the intention of the syndicate members that the Fisk firm was to be compensated for its services through the repurchase and resale of the bonds. If such was the intention, it could hardly be contended that the Fisk firm was entitled to stock compensation for any purpose.

There is no evidence showing that Harvey Fisk & Sons were consulted on matters of policy, or the construction of the project, the allocation of funds, the expenditures of the McCall Company, the selection of personnel, the negotiation of power contracts, the conduct of law actions, the determination of the ultimate level at which it was decided to build the crest of the dam, or even as to the cessation of construction activities in 1907, when the McCall Company encountered financial difficulties. In fact, the evidence is that Harvey Fisk & Sons had no more to do with management than each of the others participating in promotion of the development, as to whom no claim is made that management services were rendered. Correspondence of Lee, Higginson & Company dated July 19, 1907, obtained from Respondents' files discloses that "The management of the company (McCall Ferry) is in the hands of a committee on which is a member of the firms of Harvey Fisk & Sons, Bertron, Storrs & Griscom, and Lee, Higginson & Company; also on this committee are Mr. C. A. Coffin, and Mr. H. F. Dimock who has been interested in this project for a number of years." And as testified by the Commission's accounting examiner, his search of the Respondents' files failed to disclose even the slightest indication of any management activities on the part of the Fisk firm by W. M.

Barnum (a partner [50] of the Fisk firm through whom the management of McCall Ferry was supposed to have been carried out); that he was unable to find any communication from or to the Fisk firm or Barnum dealing with the management of McCall Company; and that the files revealed that it was to the President of the McCall Company, Mr. Dimock, that reports and communications were addressed.

Respondents' witness Gunn doubted that a formal management agreement with the Fisk firm ever existed, and testified that that firm never received any specific amount of stock for management services as distinguished from financial services. He knew of no contracts negotiated by Barnum, or of any reports or management functions which the McCall Company officers cleared through the Fisk firm or Barnum. Furthermore, he could not point to any matter which Barnum was instructed to investigate or which he introduced at Executive Committee meetings, or to any written orders or communications relating to management or construction issued by the Fisk firm or Barnum to officers of McCall Ferry or to the construction contractors, and could not identify any individual who was employed by Barnum for McCall Ferry.

Not only is there no support for the contention that the Fisk firm rendered management services, but it clearly appears that there was no necessity for the rendition of such services by that firm. The McCall Company had a special Board of Advisory Engineers comprised of "four of the most prominent engineers in the United States and known to practically every engineer." Hutchinson was a member of that Board and as Chief Engineer of the company had a number of capable assistants. [51] Hugh L. Cooper was Hydraulic Engineer and Manager of Construction. Sanderson & Porter superintended the electrical construction and managed the accounts. As testified by Respondents' witness Gunn the McCall Company "was organized by thoroughly capable people in every department of its business.

It was advised by the most eminent engineers in the country. It had capable people in every branch of it."

From the foregoing it is clear that the statements contained in Fisk's affidavit,[37] to the effect that his firm managed the McCall Company, are at variance with the facts established by competent evidence. For example, Fisk asserted that the "primary responsibility for supervising the construction of the project, the selection of personnel, and the selection of experts, engineers and contractors was imposed upon Harvey Fisk & Sons." Actually such responsibility definitely appears to have rested with the Company's officers, [52] its special Board of Advisory Engineers, Hutchinson, Cooper and Sanderson & Porter.[38]

There being no justification for the allowance of the amount of $199,570.31 on any basis, it must be excluded from the rate base.

e. *Claimed Stock Issuance Expense.*

Respondents claim two items of stock issuance expense as part of the organization expense of Penn Water. The first item of $81,906.59 was incurred during the period from 1923 to 1935 in obtaining additional financing through the sale of Penn Water capital stock. This item, erroneously classified by Respondents in Account 301, Organization Expense, is chargeable to Account 151, Capital Stock Expense. Issuance of additional stock in a period from thirteen to twenty-five years after the actual organization of a corporation neither entails organization expense within the meaning of Account 301 of the Commission's Uniform System of Accounts, nor represents an "extension" of the [53] organization of Penn Water (in 1910) as Respondents' witness Gunn theorized.

37. Respondents' Gunn testified that "The records of Harvey Fisk and Sons were never found, and the only knowledge I have of the management services rendered by Harvey Fisk and Sons are those described by Mr. Fisk * * *."

38. Hutchinson arranged for the employment of the Board of Advisory Engineers. The contracts with Hugh L. Cooper and Sanderson & Porter were negotiated by Messrs. Dimock and Coffin.

The second item, in the amount of $331,703.15, is claimed as representing McCall Company bond issuance expense incurred in 1905 which it is contended should be imputed to Penn Water common stock issued in 1910. The theory of this claim is as follows. Upon the incorporation of the McCall Company in 1905 a total of $8,075,000 principal amount of its bonds was sold by bankers. Respondents claim that the bankers received McCall Company common and preferred stock, having a cash value of $644,179.69, as compensation for the sale of the $8,075,000 of bonds. The McCall Company encountered financial difficulty in 1907 and went into receivership. Thereafter, the Bondholders' Committee accepted the plan of J. E. Aldred and his associates (who were in no way connected with the project prior to 1908) for financing completion of the development. The plan was embodied in a memorandum of understanding dated April 24, 1909, and, in accordance therewith, Penn Water was organized in 1910 to acquire from the Committee the assets formerly owned by the McCall Company, which assets had in the meantime been purchased by the Committee at a foreclosure sale. The $8,325,000 of McCall Company bonds then outstanding was paid off, 40% in new bonds ($3,330,000) and 60% in new stock ($4,995,000) of Penn Water.[39] In this process the [54] outstanding common ($4,166,500) and preferred ($5,000,000) stock of the McCall Company (the claimed cash value of a part of which is here in issue) was wiped out completely. Since, under the Aldred plan, the McCall Company bondholders received in return for their bonds 60% of their face value in Penn Water stock, Respondents contend that six-tenths of $552,838.58 ($644,179.69[40] less

39. The Aldred Syndicate, acting for the Committee, raised the new money required to complete the project by the sale of additional Penn Water bonds. Control of Penn Water by the Aldred syndicate was assured under a voting trust agreement in effect until November 1, 1912.

40. The $644,179.69 is the claimed cash value of the McCall Company common and preferred stock assumed to have been issued to Lee, Higginson & Company, (5,000 shares common), Bertron, Storr[s] & Griscom (7,462½ shares common) and Harvey Fisk & Sons (1,875 shares preferred and 17,537½ shares common, three-eighths of the asserted value of which is claimed for management services) as compensation for financing services.

$91,341.11 [41]), or $331,703.15, represents McCall Company bond issue expense now associated with Penn Water stock issue expense.

The amount of $331,703.15 is not includible in the rate base for several reasons, each independently sufficient to require its disallowance. First, the McCall Company stock had no cash value, as already shown. Therefore, no cost was incurred by its issuance which could have been carried forward under the Aldred plan. Second, the claimed distribution to the bankers has not been sustained by credible evidence as we [55] have already concluded. Third, assuming, arguendo, a cash value and distribution as alleged, no part thereof could be allowed, in the absence of a showing of cost to the bankers of any services rendered, as distinguished from profit, because of the no-profits-to-affiliates rule, the bankers being affiliated as we have seen. Fourth, any such cost would be a financing cost, not a cost of physical property, and the 6% interest allowance hereinafter made is in lieu of all other financing costs, as already stated. Fifth, the amount claimed is not properly includible in Account 301, Organization Expense.

Claimed Value of Aldred Management Services.

Respondents assert that J. E. Aldred, who participated in the organization of Pennsylvania Water & Power Company, performed management services with respect to the McCall-Penn Water development in the period from November 1, 1908 to November 1, 1912, and that for such services he was given 5,000 shares of Penn Water common stock. Respondents place a cash value of $60 a share upon this stock (resulting total, $300,000) but contend only that $218,750 with respect thereto should be included in the rate

41. The $91,341.11 is made up of $86,785.32, considered to be bond expense which should have been amortized between June 15, 1905, the date of the McCall bonds, and July 1, 1909, the date when a sufficient number of bonds had been deposited to effect the reorganization, and $4,555.79, considered to represent bond expense deemed applicable to the 66 McCall Company bonds which had not been exchanged for Penn Water securities and had been purchased by J. E. Aldred.

base, determining the latter sum as that proportion of the total value which is applicable to that part of the alleged services assertedly rendered during the claimed period of construction (ending October 1, 1911).

[56] The basis of Respondents' contention is that the voting trust arrangement provided for in the memorandum of understanding on April 24, 1909, between Aldred and the McCall Company bondholders' committee, vested Aldred with powers of management with respect to McCall Company. But it is to be observed that this agreement did not expressly vest Aldred with such powers and there is no credible evidence on the basis of which it can be determined that the parties so construed the agreement.[42]

The evidence does not reveal that prior to the date of the foregoing memorandum of understanding (April 24, 1909) Aldred was otherwise engaged, with respect to the McCall project, than in negotiating a plan of refinancing with the bondholders' committee and attempting to reach an agreement looking to a material reduction of McCall's Company's capitalization and fixed charges as a condition of his taking any part in the refinancing.[43] It was not until April 6, 1909 that he submitted a plan for the refinancing which formed the basis for the later memorandum [57] agreement entered into with the bondholders' committee. It does appear that Aldred had had various surveys made of the McCall project, but these apparently had been made solely for the purpose of informing himself in connection with his negotiations concerning the refinancing. Thus there is no proof that any management services were rendered prior to the date of the memorandum of understanding with the bondholders' committee of April 24, 1909.

At that date Respondents assert the committee stipulated that Aldred would become the active manager of the

42. One of Staff's witnesses testified that he examined the minutes of the bondholders' committee but found no indication that the Committee had arranged for any management services to be rendered by Aldred.

43. Nor, indeed, was he the only party negotiating with the committee at that time in that respect.

company during construction and until the expiration of the proposed voting trust; but it is apparent that, as of the later dates of May 20, 1909 and August 5, 1909, Aldred understood that this phase of the "managership" was to be conducted in his capacity as receiver.

Aldred was appointed receiver of McCall Company, by order of the Circuit Court of the United States for the Eastern District of Pennsylvania on July 17, 1909, with express authority to "have, hold, use, preserve, manage, exercise and enjoy" the property, rights, privileges, franchises and immunities of McCall Company, subject to the supervision of the Court. He entered into possession as receiver for a period of approximately six months, filed a final report as of February 18, 1910, in which he reported [* 3] * cash and receipts of $173,166.27 and disbursements of 33,722.91, including "receivership fee and expense" of $7,000, and was discharged on March 18, 1910.

During the receivership, Aldred had been advanced $600,000 by the bondholders' committee for use in construction. On March 3, 1910, Aldred accounted to the board of directors of Penn Water with respect to the expenditures made out of sums received by him, including principally the $600,000. His accounting stated that, while he had been receiver, "matters and situations were met" by him which could not be dealt with appropriately as receiver, and he listed as items falling in this category track relocation settlements and right-of-way purchases, the acquisition of 66 non-deposited bonds and the retainer of an attorney. However, in connection with the foregoing right-of-way acquisitions Aldred had had to give certain deeds, which he did specifically in his capacity as receiver and in his offer of settlement of his account he stated that all things done in connection therewith had been done without intention of profit or advantage to him.[44]

By this same accounting, Aldred advised the board of directors that, between August 19, 1909 and December 1,

* 2½ lines of duplication omitted in printing.

44. These actions were duly approved and adopted by the board of directors of the company.

1909, he had entered into [59] eight contracts for the purchase of cement, sand and stone, for the purchase of plant equipment, and for engineering services, all in connection with construction.[45] As to at least the five most important contracts, he made it clear, at the various times of execution thereof, either that payment would be by the receiver of the new company, or that he was acting in his capacity as receiver, or else he made contemporaneous arrangement for the assumption of ultimate liability by others. As to none of the eight contracts is it shown that at the time of the execution he had made up his mind to act otherwise than in his capacity as receiver, and nowhere does it appear that he was put to any personal expense in connection with any liability he may have technically assumed under these contracts.

With respect to same eight contracts, Aldred made no assertion in his accounting to the board of directors that the transactions represented "matters and situations" which could not be dealt with appropriately by him as receiver. His later statement in the 1939 affidavit taken by Respondents' witness Gunn to the effect that "to expedite the work . . . it became incumbent on me to enter into a number of contracts, personally" is contrary to what he did.

Therefore, in connection with whatever services Aldred rendered McCall Company during the period of his receivership it [60] must be found, insofar as this record is concerned, that he received adequate compensation in the fee he claimed and was granted by the Court as receiver.

Further, on January 13, 1910, Aldred was elected President of Penn Water at a salary of $10,000 a year, and at the same time he became a director.[46]

Thus there is no period of time during the interval in which he is alleged to have rendered managerial services

45. These contracts were also adopted and assumed by the company, March 3, 1910.

46. One of Staff's witnesses examined the minutes of the board of directors of Penn Water, but discovered no indication that in addition to his duties as president, Aldred was expected to contribute any special management services for which he would be paid additional compensation.

that he was not either under employment as receiver of McCall Company or an officer of Penn Water; and there is no evidence that the term "management", as the parties to the refinancing plan used it, ever meant or was intended to mean anything more than the "control" that he exercised as receiver, or as an officer of Penn Water, or under the voting trust.

It is also clear from the evidence that all of the stock obtained by Aldred for himself, by the bankers, and by the subscribers, was bonus stock. It was expressly bonus stock as to the new money bond purchases, who received 50% of the par value of the new bonds subscribed for in stock, as a "bonus" for which no other payment was made. Aldred himself referred to all of 35,000 shares [61] going to new underwriting as a "bonus". Of these latter shares the bonus to new money bond subscribers involved 20,850 shares, while the participating London bankers received 4,575 shares as "profit", and others, including Aldred, received similar bonuses totalling 4,575 shares. Against this inflation, the additional 5,000 shares which Aldred received, now claimed to be for management services, could have then only represented expectation of an indefinite realization out of the future operating income of the company, especially as Penn Water's stock had no cash value as of issuance and none was then indicated for the immediate future, which last circumstance was, in effect, contemporaneously stated by Aldred. If that stock could be said to represent compensation for anything, assuming arguendo, it had had any cash value, it must have been for financing services, not a part of project cost. Due allowance for such amounts is made in the allowance of 6% interest.

Quotations of sales of such stock made approximately one and one-half years later, after Penn Water had commenced the sale of power in the Baltimore market, are not evidence that Penn Water's stock had a cash value at the time of its issuances. Nor does the conversion of 66 McCall Company bonds (*supra*) afford evidence of value as to

such stock, where, as stated by Aldred, the transaction was effected to avoid litigation.

The $218,750 is, accordingly, disallowed.

[62] *Interest during Construction.*

Respondents contend that interest during construction should be computed on certain balances accumulated by them during a period from April 14, 1905 to October 1, 1911,[47] and that the interest rate should be 6%.[48] Respondents include, however, in the basis for this interest calculation certain items herein excluded from the rate base.[49] The amount thus computed by Respondents and the Staff's corresponding recommendations are:

	Respondents	Staff
Interest on construction balances	$2,505,868.34	$1,047,348.16
Interest on construction working funds	—[50]	78,371.33
Interest eliminated in other adjustments	—	1,642.17
	$2,505,868.34	$1,127,361.66

After a net credit, proposed by Respondents, in the amount of $177,138.11, which gives effect to certain income received and items expensed, Respondents' computation of interest during [63] construction reduces to an amount still $1,201,368.57 higher than that recommended by the Staff.

The staff contends that the construction period should be terminated December 31, 1910, and thus puts in issue both the interest calculations of Respondents and also the proposed credit for income and items previously expensed,

47. October 1, 1911 is the beginning of the period of commercial operation, as claimed by Respondents.

48. That is ½% of monthly balances, less ¼% for additions. The Staff used the same interest rate and followed the same procedure.

49. Such items represent certain of those which originated prior to October 1, 1911, the date fixed by Respondents as the end of the construction period and the beginning of commercial operations.

50. Not claimed by Respondents.

or a total difference of $1,378,506.68 as indicated in the tabulation above.

With respect to the interest period, the Staff contends that interest should be allowed only for the periods April 14, 1905 to October 31, 1907, September 1, 1909 to December 31, 1909, and all of the year 1910, with an additional allowance for interest on investment in hydro units placed in service during 1911. In other words, the Staff recommends that no allowance be made for interest during the so-called cessation period extending from November 1, 1907 to August 31, 1909, and that generally capitalization of interest and taxes be terminated as of December 31, 1910. On the other hand, Respondents contend that work was done from November 1907 to November 1908, which directly contributed to the completion of the McCall development, though admitting that between November 1, 1908 and August 1909 there "was no overt construction activity—solely the result of economic conditions over which the management of McCall Company had no control".

The original underwriting was for an initial plant at McCalls Ferry site to deliver 50,000 hp to the City of Philadelphia (Pa.), and to cost, with steam auxiliary and an allowance for working [64] capital, $7,200,000, and on this basis, $8,000,000 of bonds were underwritten at 90.

On August 7, 1905, the engineers revised the original estimates of cost for a hydro plant with a dam crest at 155 feet (without steam auxiliary) from $5,491,000 to $6,750,000.[51]

On June 20, 1906, the Executive Committee of the Company decided upon a dam height of 165 feet. This entailed an increase of substantially $2,000,000 in the hydraulic work alone. Estimates made at that time disclosed that a 165-foot dam at McCall Ferry, with 7 initial units providing an output of 50,000 hp would cost $8,859,000. On October 3, 1906, $335,000 more was added to cover tailrace improvements, making an estimated total to complete

51. No explanation was given for this increase.

of $9,194,000. On November 30, 1906, the Vice President of the Company stated that the latter would have to raise another $1,646,000 to complete the installation. Approximately five months later officials of McCall Company estimated the final cost at $9,815,000, and the Chief Engineer again noted that the Company would be short of funds for the project.

Beginning in early July, 1907, the original underwriters began to take steps to provide funds. At that time, Bertron, Storrs & Griscom wrote Lee, Higginson & Company that McCall Company would [65] need approximately $500,000 by fall, but that they had about six months in which to make arrangements for an additional $1,000,000.

On October 21, 1907 the Knickerbocker Trust Company failed [52] and within three days McCall Company's manager of construction, by telephone, ordered the manufacturer to suspend work on the production of turbines, and the manufacturers of electrical machinery was directed to stop work on the generators and auxiliary equipment. On November 1, work on the dam ceased, and the work on the tail-race, walls and other parts of the power house stopped. Only such men were retained as were deemed needed to guard the completed work against danger during the winter, put the construction equipment in winter quarters, and for minor work in the power house.[53] The work as a whole was estimated by the Chief Engineer as 80% completed.

In April 1908, provision was made for resuming work on the tail-race, cleaning up around the power house and raising the wing dam. The total amount required was esti-

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52. The nature of the panic of 1907, its effect upon the financial markets, the ability of borrowers to find money, and of lenders to provide it is well known, and of these matters notice is taken.

53. After the first and through the twenty-second of November, never more than 124 men were employed on any one day at the site, and these were employed on concrete and form work, some repairs and miscellaneous minor matters. The work included placing 600 yards of concrete in the power house substructure for protection against water and 130 yards in arches as protection against ice, with some work done by carpenters to render headgates safe and the power house concrete safe against high water and floods. By February 1, none of the hydraulic engineer's construction organization was considered necessary.

mated at approximately $194,000. In October 1908, Susquehanna Company arranged to borrow some [66] additional money for McCall Company, but by November funds available to McCall Company were exhausted. No further work was done until after Aldred became receiver in July 1909.[54]

Prior to his appointment as receiver, Aldred had negotiated an underwriting commitment with London connections, and, shortly after his appointment, by another such agreement with other parties (of Montreal, Canada) he succeeded in perfecting his financial plans to raise approximately $3,800,000 cash [55] for reorganization of McCall Company and completion of construction of the project. Thereafter, securing advances from the bondholders' reorganization committee, and beginning with the date of August 15, 1909, and continuing to December 1, 1909, Aldred entered into contracts with Empire Engineering Corporation for supervision of construction, with material-men for various items of construction materials, and with manufacturers for the completion of machinery and equipment originally ordered by McCall Company. Construction work was resumed approximately on September 1, 1909.

[67] There is no evidence that the 1907-1909 cessation can be attributed to the fact that the lender (Knickerbocker Trust Company) under the contract of November 1, 1905 with Susquehanna Contracting Company, went into a receivership in October 1907, for at the time of the initiation of the receivership of the Trust Company that lender was not obligated on any call for funds for project construction purposes. The general economic situation undoubtedly delayed the procuring of additional funds, but the shortages of finances had not taken the officers of McCall Company by surprise. They were early apprised of the necessity of finding additional money to complete the project. The record discloses that contemporaneously with these events

54. McCall Company defaulted in the payment of bond interest December 15, 1908. A bondholders' committee has been formed prior thereto. And on complaint filed by Knickerbocker Trust Company, as trustees under a mortgage securing the bonds, Aldred was appointed Receiver, July 17, 1909.

55. $4,170,000 in principal amount of bonds at 90.

Hutchinson as chief engineer of McCall Company stated, in effect, that the omission to take steps to provide more money led to the Company's discontinuance of construction. He not only made no reference to market conditions as the primary cause but later, in statements made at the Respondents' request, further stated that it was due to delays that funds became exhausted.[56] Nor can it be said, on the evidence in this proceeding, that the work performed during the cessation period definitely contributed to shortening the construction period.

Therefore, interest during construction will not be allowed for the period November 1, 1907 to August 31, 1909, inclusive.

[68] *End of Construction Period.*

The initial plant (1905-1906) was conceived as a 7-unit project capable of producing 50,000 hp, with provision for the further addition of 3 units capable of producing 25,000 hp more.

The project, as reconsidered in connection with the reorganization of McCall Company, was designed for 5 units to develop approximately 50,000 hp. The available market was not determined at the time the initial plant was first projected, the promoters merely looking to the sale of 50,000 hp in either Baltimore, Philadelphia, or any point within the territory. Contracts for the sale of power, however, were executed prior to the receivership of McCall Company with Baltimore Company (June 4, 1907) for 4,000 kw firm, and with The United Railways and Electric Company of Baltimore (United Company) (June 28, 1907) for 10,000 kw firm. With the reorganization, the development was proceeding without the necessity of immediate negotiation or renewal of contracts for the sale of power, but such contracts were later executed with Baltimore Company (August 29, 1910) for 14,666 kw of firm, and with United Company (February 8, 1911) for 12,000 kw of firm.

56. This statement is found in an affidavit in evidence on Respondents' own motion.

Unit No. 1 went on the line for contract delivery to Baltimore Company on October 23, 1910. Though first subject to a minor bearing defect, this unit was always considered operational and by the end of June had had the advantage of a protracted period of bearing inspection, and bearing overhaul, and work on head and tail gates was almost entirely completed, so that from then on to the end of the year, excepting two outages for unknown causes, one [69] of which occurred during a low flow period, Unit No. 1 experienced just one outage, of a relatively brief character, for governor valve repair.

Unit No. 2 went on the line on February 23, 1911, and Unit No. 3 on March 25, 1911. Unit No. 2 had experienced bearing trouble, and Unit No. 3 had experienced bearing delays and governor trouble prior to going on the line, but these defects were corrected, temporarily or otherwise, by various devices, Unit No. 2 operating on a water thrust bearing, subject to hand control, and Unit No. 3 on a permanent bearing with an adjusted governor, each without further mishap arising from known causes, until a time that lies beyond the date (October 1, 1911) fixed by Respondents as the date of the commencement of commercial operations.

Units Nos. 4 and 5 were assembled (with generators ready to run) on April 29, 1911 and June 30, 1911, respectively, and were put on the line on May 19, 1911 and July 25, 1911, respectively, neither unit experiencing any significant outage prior to the date fixed by Respondent, aforesaid.

The six transformers which became operational between October 21, 1910 and August 17, 1911, were subject to certain outages, Nos. 1, 2 and 3 for brief periods and from unknown causes during the first 6 months of 1911 and not at all thereafter to October 1, 1911. Nos. 4, 5 and 6 suffered considerably from lightning and the damage resulting, but at no time, from June 1, 1911 to October 1, 1911 did Respondents have less than a rated normal trans-

former capacity available of 22,500 kw, which was approximately [70] sufficient to carry the combined Baltimore loads except principally for a part of the Saturday night and Sunday peaks.

On February 24, 1911, Baltimore Company had been advised that it could take on load up to 14,000 kw, and in early March, Respondents were supplying the contract requirements of Baltimore Company from 2 units and expected to be in position within 6 weeks to start the delivery of power to United Company under its contract. Thereafter, for causes not satisfactorily established in the evidence, Baltimore Company's load dropped, but for no month during this period of reduction in Baltimore Company's draft (April, May and June) did that company take less than 89.5% of its so-called monthly prorate of its annual entitlement of 70,000,000 kwh. Further, the allowance of rebates to Baltimore Company by Penn Water for the effect on deliveries of Respondents' initial equipment and service deficiencies ceased with the power bill of the month of March and did not resume thereafter. Approximately mid-May (1911) Penn Water's then chief engineer reported that the delivery of power to Baltimore Company had been going along very well, the maximum peak at the power house having been 18,000 kw and the average deliveries amounting to about 5,000,000 kw per month.

As of April 17, 1911, Respondents were endeavoring to be fully prepared to make delivery of power to United Company by June 1, and on May 18, 1911, the work of preparation was authoritatively stated to be going along in fine shape, the then chief engineer of Penn Water reporting, "We will be ready to deliver power to the Railways Company by June 15". However, [71] that customer was making slower progress with its part of the preparatory work and refusing to agree to the installation of apparatus available that would have expedited the date of readiness. Delivery of power to United Company was first made by mid-July and on July 17, 1911 on a full contract basis, and it is

significant that Respondents' witness Walls recalls that this customer experienced none of the service interruptions that had previously been experienced by Baltimore Company.

An analysis of interruptions experienced in the period of January 1, 1911 to August 24, 1911, made at the time, discloses that of 30 total interruptions, 19 were caused by lightning, 4 by troubles on customers' systems, 4 were due to station troubles or operator's mistake, and the remaining 3 for causes not here significant. All other interruptions (less than total) were caused by customers' systems or were insignificant in effect. Though lightning caused such a high proportion of the interruptions, only 4 out of 5 storms affected Respondents' system, and it was the opinion of Penn Water's then operating superintendent that the proportion of interruptions, considering all storms, was small. Causes other than lightning accounted for interruptions totaling 1 hour and 49 minutes in the first six months of 1911, and 1 hour and 12 minutes during the next four months (to October 1, 1911), while lightning interruptions accounted for a total of 24 hours and 20 minutes during the same total period of time. But this difficulty of lightning was not peculiar to Respondents' system for it was generally "the assailable link in modern hydro-electric power supply" at that time and Respondents were still [72] making extensive improvements to eliminate lightning disturbances in 1913.

The Commission has stated in previous opinions that the determination of the date upon which the capitalization of interest and taxes during construction should cease is not controlled by artificial rules, is not a matter of formula, but is a matter of reasonable judgment based on a consideration of all the pertinent facts. It is true that reasonable time should be allowed for test periods and trials, the correction of defects and adjustments, and time for the plant to become sufficiently completed to be reasonably reliable for service for the purpose for which it was intended. Nevertheless, neither full capacity generation, nor the completion of all construction activities, nor the making of per-

manent installations, as against those of a temporary nature, are a *sine qua non* with respect to this determination. Suspensions of particular machines for certain supplemental construction processes do not necessarily influence the determination, nor outages as merely outages; nor, under the Act, would it be proper to permit the determination to be influenced solely by the fact that revenues received had not equalled interest charges, nor earnings a fair return on the property.

After careful consideration of all the evidence in this proceeding on this subject, it is found that the date of the end of the construction period was June 30, 1911; interest is capitalizable through that date, except for the "cessation period" previously discussed, and net revenues should be credited to cost of plant up to that time.

[73] *Expenditures during the Cessation Period (1907-1908).*

The amount here at issue is a total of $143,981.46 embracing (1) administrative and other expenses from November 1, 1907, the date of suspension of work at the McCall Ferry project, to September 1, 1909, the approximate date on which construction resumed; (2) wages, salaries and incidental expenses charged to "Cessation Expense Account"; and (3) salary of the chief engineer of McCall Ferry and engineering fees. These items consist of the following three categories:

1. Administrative and Other:	
a. Local office accounting, salaries and expenses	$ 4,977.37
b. General office salaries[57]	10,255.94
c. Engineering experts[58]	11,225.00
d. Insurance (fire, compensation, fidelity, etc.)	7,500.00

57. Vice President, treasurer, chief accountant, accountant, secretary, assistant to treasurer, stenographers and clerical, miscellaneous.

58. Resident engineer, assistant resident engineer, assistant engineer, assistant to chief engineer, electrical inspector.

e. General office supplies and expenses	13,851.39
f. Engineering expense	2,053.27
g. Traveling expense	126.39
h. Miscellaneous expenses	2,910.16
	$52,899.52
2. "Cessation Expense Account", Salaries, Materials and Supplies and Other:	
a. Salaries and wages	28,277.12
b. Salaries and wages in arrears	4,624.07
c. Materials; supplies, and tools	2,175.34
d. Freight	750.89
e. Miscellaneous	617.79
	$36,445.21
3. Salary of the Chief Engineer and Engineering Fees:	
a. Hutchinson's salary after Nov. 1, 1907	15,499.94
b. Hugh L. Cooper fee (completion bonus)	29,926.27
c. Sanderson & Porter fee	9,210.52
	$54,636.73

[74] Respondents contend that the expenses in the first category were necessarily incurred in connection with the direct costs of field work and design during the period of cessation, and that since the Staff has taken no exception to the inclusion in the rate base of direct costs incurred in this period, these overheads should be included therein.

Respondents contend that the expenses in the second category were unavoidable costs necessary to carry the project to completion and should be included in the rate base.

Respondents contend that the items in the third category represented salaries and fees paid with respect to

work that contributed to the completion of the project or for contract services to McCall Company which the parties were ready to perform and should be included in the rate base.

With respect to the first two categories, considerable judgment is involved in segregating expenses which contributed directly to construction work and those which did not. In general, the Staff's recommendations have been based upon the principles that (a) general overheads applicable to the period of cessation are not proper construction costs, and (b) overheads which related to construction work, without duplication, are proper.

Respondents' witness Gunn admitted that, but for the cessation, overheads would have been charged over a shorter period and that the contribution of the office work done during this period to the shortening of construction after its resumption cannot be determined. The contention that the salary of the vice president and [75] general manager and the secretary and treasurer of McCall Company should be included as their services related to plant designing during the period is based upon unsupported inferences.

As to the salary of Hutchinson, though as Chief Engineer of McCall Company he issued instructions in April 1908 with respect to the completion of the tailrace excavation and the raising of the wing dam and made further estimates at that time with respect to the cost of completion of the project, he was not, during the cessation period, in direct supervision of construction.

With respect to engineering fees, (1) Cooper, though paid on the basis of his contract, did not complete the work he was under contract to do, Empire Engineering Corporation later completing the work for an additional fee, and (2) Sanderson & Porter, though paid on the basis of their contract with McCall Company which called for their services with respect to the complete installation of electrical equipment, transmission lines and substations, never

did more than prepare certain designs, Penn Water later undertaking to design and make the same installations at its own expense with its own engineering force.

The opinion of Respondents' witness Gunn that general engineering conducted during the cessation period contributed to decrease the time necessary to complete the project after assumption of construction (approximately on September 1, 1909) is patently based upon the witness' speculations.

There is no showing that the general designing, planning and administration of cessation period served actually to shorten [76] the following period of construction; and, therefore, it is found that the foregoing amounts representing expenditures during the cessation period in the sum of $143,981.46 should not be included in the rate base.

Promotion Expense (1911-1914).

Respondents contend that an amount of $29,601.59, consisting of promotion expense, should be included in the rate base. Respondents' contention is that under Account 71 of the Classification of Investment in Road and Equipment of Steam Roads, prescribed by the Interstate Commerce Commission (1914), the capitalization of this item is required, but it is to be noted that Account 71 refers to organization expenses only and such expenses are usually incurred at the inception of a company and not over a period of years subsequent thereto.

These charges, recommended for exclusion from the rate base by Staff, include a portion of the salaries of the president of Penn Water, the vice president and treasurer, the expense of office rent, traveling, booklets, photos, maps, entertainment, special trains, stock certificates, legal expenses, security listing fees, and miscellaneous.

Respondents concede that it is impossible to tell precisely to what these expenses relate. Respondents' witness Gunn could not state the nature of the activities of the officers whose salaries were partly charged under these items,

nor the purpose of charging office rent or traveling expenses. The character of the booklets [77] issued was not known, nor of the photographs, the maps,[59] the entertainment or special trains. An unsegregable amount was thought by Respondents' witness Gunn to be stock issuance expense.[60] Legal expenses represented services performed with respect to (1) subsidiaries that were never active, (2) the listing of securities, and (3) the securing of commission approval of contracts. The nature of the foregoing items indicate that the $29,601.59 is composed in part of operating expenses and in part of stock issuance expense, substantially all of which were incurred subsequent to the date determined herein (July 1, 1911) as the date of commencement of commercial operations.

It is therefore found the expense here involved should not be included in the rate base.

Credit for Property Transferred (1908)

In 1908, McCall Company disposed of certain land below McCall Ferry and Penn Water, as successor, proposes to credit plant account with an amount of $162,936.02, which is less than the amount later realized in connection with this transaction. The staff recommends that the amount of the credit be the same as the amount [78] ultimately realized ($200,000). The difference, $37,063.98, is in dispute.

By agreement dated February 20, 1908, McCall Company agreed to convey its interests along the Susquehanna River below the foot of Cully's Falls at the McCall Ferry dam site (in both Pennsylvania and Maryland) to the Susquehanna Power Company (Md.) and to a subsidiary of Susquehanna Power Company (to be organized in Pennsylvania) for $760,000 of bonds of Susquehanna Power

59. The evidence is that the map was prepared for Moody's Manual (1914)—clearly not a purpose justifying capitalization in plant accounts.

60. A small amount of treasury stock was issued during this period, and the voting trust in respect to Penn Water stock provided by an agreement dated February 7, 1910 terminating in 1912, for the converting of voting trust certificates into stock certificates.

Company and certain shares of stock thereof.[61] The McCall Company properties were conveyed and subsequently under a later agreement dated March 5, 1912, Penn Water agreed to sell to certain purchasers its then remaining $703,000 of bonds of Susquehanna Power Company and its then remaining shares of stock for $200,000 in cash.[62] This latter transaction was consummated in accordance with the agreement.

Penn Water determined the amount of the proposed credit to plant account ($162,936.02) on the basis of a claimed value as of August 11, 1908, the date of sale, which it now places on the interests conveyed in 1908. No direct evidence of value was found by Penn Water, so its witness Gunn derived a value by discounting the $200,000 at 6% from 1912, date of realization, to August 11, 1908. . . .

[79] Under the Commission's Uniform System of Accounts, the land below Cully's Falls should never have been included in plant account (Electric Plant Account Instruction 9-J). Moreover, the lands involved in the above transaction were substantially all acquired as a part of the total of lands and rights purchased from Harlow-McGaw in 1905 for an over-all consideration of $200,000 in cash and $250,000 in bonds at 90%; Penn Water inherently assumes that after this transaction more than a majority of the rights and interests acquired under the Harlow-McGaw contract was retained, an assumption which is not substantiated by the evidence.

It is apparent that the $200,000 is the best evidence of the proper credit to Penn Water's plant account, and it is so found.

Profit on Property Sold (1930).

In June 1930, Penn Water transferred to its affiliate, Safe Harbor, under a sales agreement, and at a total price

61. "Certain shares" refers to the entire stock part of the transaction, i. e., the shares originally received (Susquehanna Power Company, common) and those into which such shares were later converted (Susquehanna Properties Company, a holding company for all shares of Susquehanna Power Company).

62. Certain of the original amount of bonds and certain of the shares of stock had been disposed of in settlement of legal services.

of $193,545.00, certain properties which had been acquired by Penn Water in 1905, including those known as the Witmer and Willson properties, and a portion of the Harlow-McGaw properties.[63] The Witmer properties had been acquired at a cost of $38,985.00, Willson properties at a cost of $5,537.00 and Penn Water has calculated that the value of the transferred Harlow-McGaw properties, as of the date of the beginning of commercial operations as contended [80] for by Respondents (October 1, 1911) was approximately $29,082.80. Accordingly, Penn Water contends that the cost of all three groups of property to McCall Company should now be found to be $73,604.80 and the difference of $119,940.20, between price and cost, restored to Penn Water's plant account.

For the purpose of this proceeding, it is only necessary to inquire whether the amount of the credit reflected in Penn Water's plant accounts at the time of the foregoing sale to Safe Harbor was proper.

By this 1930 transaction, Harlow-McGaw properties, which until then remained in Penn Water's plant accounts at a calculated original cost of $379,824,[64] were divided so that 11.68 miles of canal and 117 acres were transferred to Safe Harbor and 8.32 miles of canal and 28 acres were retained by Penn Water. In the absence of direct evidence to the contrary, this establishes that considerably more than a half of the rights and interests retained up to 1930 by Penn Water, out of the original Harlow-McGaw properties, were transferred to Safe Harbor. One-half of the $379,824 (above) more than equals the amount of the total price of $193,545 less the admitted cost of $44,522 for both the Witmer and Willson properties, and, accordingly, this adjustment contended for by Respondents should not be made in determining cost or the rate base.

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63. The properties had never been used in the McCall project. The contract to sell was dated August 21, 1929, the transfer taking place June 19, 1930 (T. 7863).

64. Additional interest for the 6 months from January 1, 1911, the Staff's recommended date of commercial operations, to July 1, 1911, the date found herein as the date of the commencement of commercial operations, would increase the $379,824 to $388,549.

[81] *Flashboard Development and Roller Dam Investigation Expense (1913-1921).*

Respondents contend that an amount of $49,754.97, representing experimental costs incurred from 1913-1921, inclusive, in connection with the perfecting of a system of flashboards to be used on the crest of the dam to provide additional head for the generation of additional electricity, should be included in cost of plant and in the rate base.

The foregoing amount is composed of items relating to the erection, renewal and testing of flashboards, and items charged to the general hydraulic and main dam account (1914-1916) in connection with an investigation of the possibility of using a roller dam in place of flashboards.

As of September 1912, Penn Water had gotten very satisfactory results from the use of flashboards installed along the crest of the dam to provide additional water storage. The installation of these flashboards had been carefully designed to avoid flooding out certain properties upstream, particularly as an injunction and law suit for such flooding had already been brought against Penn Water. Even as of February 1912, the installation had been ready for use—in fact as early as the last of August 1911, the assistant chief engineer reported on the operation during high water of what he referred to as "weir boards all along the dam".[65]

[82] Penn Water, however, was not satisfied with the original installation, both because of the difficulties of installation and the unsatisfactory manner of operation, the latter being due to the irregular bending of pins which were designed to fail at a certain height of water. Thereupon, Penn Water experimented with the use of sills, panel handles, and panels of various lengths. The substitution of a roller dam in lieu of flashboards was studied from 1914 to 1916, and, because of the expense it would have entailed, was abandoned. The result is that, except for the change

65. Installation started with the drilling of holes for the supporting pins, July 26, 1911.

from solid supporting pins to seamless tube supporting pins, the flashboard system now in use is, in general, the same system in use in 1912.[66]

On the basis of the evidence of record in this proceeding it is found that the flashboard expense incurred during the period 1911-1912 covered the original cost of installation of a system adequate to provide for the additional storage of water required; that all of the other related expenditures Respondents contend should be included in plant relate to either improvements in operation or to experimental improvements tried and abandoned without having been put to permanent use. It is therefore found that the expenditures here in issue, in the amount of $49,754.97, are not a cost of plant and are not includible in the rate base.

[83] *Charges to Flowage Basin Account (1910-1936).*

Respondents contend that certain acquisition expenses and certain expenses relating to legal and engineering services should be included in the rate base in the amount of $177,630.24. These expenses were incurred as follows: *1910-1924:*[67]

Lancaster Office			
Salary (Bushong)	$50,423.24		
Other Expense	27,127.82		
Legal Fees	21,920.00	$99,471.06	
Office Engineering		45,325.71	
Misc. Office Expense		561.65	
River Observations		4,988.45	$150,346.87

66. A wicket gate experiment lasted from 1916 through 1919, flashboards not being used during a part of the time because of an injunction proceeding which was not settled until March, 1916. Flashboards were in use from July 1917 on.

67. The account started in 1910 but the amounts in dispute represent charges that commence with 1911 or later years.

1925-1936:			
Lancaster Office			
Expense (1926-1930)		20,787.41	
Triangulation System			
Extension	3,338.25		
Property Ties	3,157.71	6,495.96	27,283.37
			$177,630.24

The $50,423.24 of Bushong's salary charged to Penn Water's Lancaster office relates only to that part of the 1910-1924 period that follows the opening of the office at Lancaster (Pa.) in March 1916. Respondents state that Bushong was hired in 1912 to devote his full time to the purchase of property required as a result of the use of flashboards on the dam and the consequent flooding of additional lands. From 1912 to March 1916, the date when the Lancaster office was opened, Bushong took a number of options [84] on land and completed a number of purchases;[68] but thereafter, to and including 1924, fewer options were taken and fewer acquisitions made. Of the latter acquisitions only a part was concerned with flowage rights and a significant number of those arose out of previous litigation. It is obvious that the establishment of the Lancaster office in March 1916 was not due solely to the needs of such an office for acquisitions necessary for operations with flashboards. Indeed, Respondents state that after 1915 Bushong's duties included other matters not directly associated with property purchases or plant additions and imply that a reasonably complete identification of expenses connected with such other matters could not be made and could not be segregated. Many of these other duties (1916 et seq.) clearly related to operations and expenses relating thereto are improper items to capitalize.

68. The rate base will include Bushong's salary as charged to subaccount F of Penn Water's "Flowage Basin Account" for the period 1912—March 1916.

With respect to both the amount of Bushong's salary and the other office expense[69] which Respondents propose to capitalize, there is insufficient evidence upon which to make a segregation of allowable items of expense after March 16, 1916.

With respect to Respondent's claim for legal fees as an item of Lancaster office expense, these include fees paid to an [85] attorney, J. E. Malone (1916-1923) in various amounts, totalling $20,750, and fees paid the New York firm of Simpson, Thacher & Bartlett (1915, 1920) in amounts totalling $1,170. Respondents state that Malone was active in all local property matters and litigation from the time of his employment in 1912. The amounts charged to the flowage basin account with respect to Malone's services were apportioned amounts for the years 1916, 1917, 1920, 1922, and 1923, while for the years between the fees were either those paid for full services (1918, 1919) or for additional services (1919, 1921). The amounts for the services of Simpson, Thacher & Bartlett were apportioned for both the years in which they were incurred (1913, 1920). None of the services can be identified with any particular property, and further no properties were acquired from April 1916 to July 1920, except for a foreclosure in 1919 with respect to a single property.

Respondents are unable to state the basis used for the determination or apportionment of fees and the inclusion thereof in plant is unjustified on the record in this proceeding.

Penn Water charged the amounts of $45,325.71 and $561.65, relating to the engineering office, to the Flowage Basin sub-accounts entitled Engineering Salaries and Expenses and Miscellaneous Office Expenses from 1911 to 1924 without explanation of the work done. In support of its contention that the charges related to plant investment and not to operating expenses, Respondents [86] submitted a

69. Direct expenses in connection with the acquisition of properties in the period following 1915, including legal fees and miscellaneous expenses are being included in the rate base.

memorandum prepared by the Assistant Secretary of the Company, giving his opinion as to the nature of the charges based upon an inspection of engineering field notebooks and drawings, the history of the flashboard suits and the recollections of an engineering department employee. Respondents now describe these charges as representing the expenditures for (1) river observations (collecting original data regarding flow characteristics, rates of run-off under varying rainfall conditions, etc.); (2) back-water observations and surveys required for the defense of lawsuits; and (3) property surveys required for information prior to purchase of property and for marking boundaries after acquisition. But Respondents did not relate the engineering work set forth in the field notes and drawings to any specific charges in the Flowage Basin accounts and, in fact, the witness stated he did not know where the cost of the work represented by the engineering data he examined had been charged.

The various items of cost, as described by Respondents, are ordinary operating expenses, except for the cost of the first survey of properties in connection with their acquisition which would be a capital investment. The costs of such surveys have been segregated in another Flowage Basin sub-account entitled "Surveying Property" which we have allowed in full. There is no evidence that the costs of property surveys were improperly classified at the time of the cost distribution. The unsupported reclassification, made many years later, does not justify the [87] inclusion of any portion of the amounts of $45,325.71 and $561.65 in investment in plant.[70]

The item claimed in the amount of $4,988.45 for river observations is subject to the same general conclusions

70. It cannot pass without comment that Penn Water did not call as a witness the one member of its organization (Bortner) more able than any other to testify to the details and nature of the items here involved. This individual was offered as a witness as to the fair value of land and rights-of-way, which testimony was excluded, but not for any other purpose. He was referred to frequently in the testimony of Respondents' witness Gunn and was available in the hearing room but never testified.

applicable to the consideration of similar functions set forth in connection with Respondents' contentions relating to office engineering expense, *supra*.

Lancaster office expense in the amount of $20,787.41 is claimed for the period 1926-1930, consisting of office expense proper, a part of the salary of Bushong, services of sundry persons, liability insurance and distribution of expense accounts.[71] These charges were made under a job order (M-387) which provided for salaries, office expenses, and regular current expenses in connection with the Lancaster office, expressly excepting specific jobs such as the purchasing of real estate. Nevertheless, there is being included in the rate base herein, as plant cost, items [88] relating to title searches, recording, and sundry expenses for the period, which were charged to this work order.[72]

Because of the character of the Lancaster office after 1925, as an office having an exceedingly minor relation to any sort of project cost work, and as Respondents have failed to present any evidence enabling determination of any item of Lancaster office expense as proper for capitalization, none of the amount of $20,787.41 can be included in plant.

Respondents contend that the cost of work done with respect to the extension of its triangulation system (Job order C-791, 1929-1932) and the making of property ties thereto (Job order C-970, 1932-1934) should be included in the rate base.

Items for the triangulation survey and property ties in the total amount of $6,495.96 represent proper plant costs, which should be included in Respondents' rate base.

Survey of Storage Reservoir Sites (1910-1911).

Respondents contend that an expenditure of $12,420.77 for the establishment of gauges for the determination of

71. Beginning January 1926, a fixed percentage of the expense of this office was charged to operations; after 1929, a further change was made in this respect.

72. During this time only one new property was acquired (1927) and there was only one flooding or "flashboard" suit.

river flow should be included in the rate base. However, there is no evidence that the charges represented by this amount were incurred for the purpose. Respondents attempted to get in evidence a statement as to the character of the charges included in this account by offering Schedule F-3 of Exhibit 320, but failing to produce any witness who [89] could testify to the descriptive part of the schedule that much thereof was rejected by the Hearing Examiner.[73]

The Staff's exhibit disclosed that the amount of $12,420.77 is composed of charges to an account entitled "Reservoir Surveys Account" made during the years 1910 and 1911, and which cover survey work, general office charges, automobile expenses, superintendence, Harrisburg office expenses, instruments, salary of W. E. Bennett, and interest. The Staff's witness Newlands testified that he found nothing in his investigation of Respondents' accounts and records to support its claim that the amount represented "the cost of establishing and rating of new gauges, rating of existing gauges and determination of time relation data between gauges".

The Staff has treated this amount as related to surveys made under the supervision of W. E. Bennett, whose name appears in this survey account in connection with a salary item. Contemporary letters between Bennett and Aldred (Receiver), Aldred (President) and Walls (Chief Engineer), Walls and Bennett, and Clarke (Vice President) and Bennett, all show that from 1909 into 1911 Bennett was engaged in a continuing investigation of probable sites for the storage of water on the tributaries of the Susquehanna and in obtaining data for use before the state legislature. He also investigated the branches of the Susquehanna in the vicinity of Harrisburg for similar purposes, and later studied the matter of locating a series of low storage dams on the Susquehanna proper.[74]

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73. Again Respondents could have saved trouble by calling as a witness Penn Water's employee Bortner, who was frequently in the hearing room during the proceedings.

74. Such work continued at least late into 1911.

[90] It further appears that Bennett distributed salaries and expenses of himself and his assistants among classes of work, distinguishing, for example, between the reservoir survey account and the gauges account, as well as various other accounts.

It is found that Respondents have not established the propriety of the inclusion of the amount in question in the rate base.

Cost of Land Acquired from Affiliate (1931).

Respondents contend for recognition as cost of plant an amount of $24,151.83, which the Staff contends was a write-up. The item arose out of a transaction between Transmission Company and The Baltimore Electro Alloys Company.

The Baltimore Electro Alloys Company was organized by Penn Water as a non-utility affiliate in 1915 for metal manufacturing purposes, with a plant in Baltimore adjacent to Transmission Company's Highlandtown substation, in connection with which four tracts of real property were bought in 1915-1918 at a book cost of $30,949.60. After a sale of a portion of this property in 1919, the remainder was carried on the books of the Alloys Company at $24,805.42. The Alloys Company discontinued operations in 1919 or 1920, and later (1931) sold its real property and appurtenances to Transmission Company. On the basis of an appraisal by an employee of Penn Water, Transmission Company entered this acquisition in its plant account at $50,000, or $25,194.58 in excess of its cost to the Alloys Company. After a sale of a small portion of the tract by Transmission Company in 1937, the excess of recorded cost ($25,194.58) was adjusted to $24,151.83, the amount here in issue.

[91] Respondents take the position that under the Uniform System of Accounts of the Commission it is proper to enter the $50,000 as representing cost, contending that the prop-

erty was first devoted to utility service by Transmission Company.

It is found that this transaction is one involving a profit between affiliates, that the amount in question consists of a write-up not properly includible in plant and, therefore, in the rate base.

Cost of Defending Title to Land (Mill Tract, 1932).

Respondents contend that the amount of $1,427.42, representing salaries and expenses of witnesses, legal fees and court costs incurred as a result of defending an ejectment proceeding brought against Penn Water (1932) in a boundary dispute should be included in the rate base. The court held, in the ejectment proceeding, that Penn Water did not have title to the land and thereafter the latter purchased the land. The cost of purchasing the tract was entered in plant account and is not here in issue, but the cost of the legal action was originally charged as an operating expense.

The action at law added nothing to the value of the property as subsequently acquired, and the original accounting with respect to the cost of defending title was correct. The amount of $1,427.42 will not be included as a part of Respondents' rate base.

Conowingo Backwater Litigation or Agreement Expense (1923-1928).

Respondents contend that the sum of $39,301.46 should be included as a part of the rate base, since it is identified with an [92] agreement relating to the adjustment of interests in connection with the construction of a downstream hydro plant (Conowingo, Maryland) and embraces the cost of a study made (1925-1928) as to the anticipated effect of the downstream development on Penn Water's hydro operations, as well as a fee for legal services (1923) and certain travel expenses (1926) with respect thereto.[75]

75. Embraced in: legal expenses, $21,053.30; consulting engineers' services, $2,272.94; distribution of salaries and wages, $12,223.36; miscellaneous, $3,751.86; total, $39,301.46.

In 1925 Penn Water brought suit in equity for an injunction against The Susquehanna Power Company to enjoin the construction by the latter of a dam at Conowingo (Maryland) with a crest exceeding 100 feet, on the ground that a dam of greater height than 100 feet would cause a back flow upon Penn Water's tailrace, which then extended some 7,000 feet below the Holtwood dam to the foot of Cully's Falls. The Susquehanna Power Company, by answer, put in issue rights which allegedly had accrued prior to certain improvements made by McCall Company to the tailrace, consisting, largely, of the excavation of Cully's Falls and the lowering of the foot thereof.

In February 1926 the parties to the suit entered into a 50-year renewable agreement, and the suit was stayed.

The above study was used to establish: (1) that the river fall between Penn Water's forebay and the Conowingo tailrace would be most economically developed by permitting the lower (Conowingo) dam to be built to a height of approximately 108 feet; (2) that in such event Penn Water's average annual loss in energy output and demand value under then existing conditions would be $72,000, exclusive of [93] other losses not evaluated; and (3) that the average annual gain in energy output alone from the Conowingo project would be $195,500. It was thereupon agreed that Penn Water would consent to the construction of such a dam and would receive as compensation for its losses in energy output and demand value $72,000 a year plus $61,750 as its share in the Conowingo project's estimated annual gain of $195,500.[76]

The Staff's contention is that the expenses of $39,301.46 were incurred in the negotiation of an agreement that resulted in no addition to Penn Water's land, rights, or property, but only provided compensation for loss in revenues, and that these expenses are therefore chargeable to operations or surplus. Respondents take the position that the expenses were incurred in connection with a suit to defend

76. For each year after the fourth year from February 20, 1926.

title to its land and water rights and, therefore, should be included in the rate base.

The facts are that this agreement does not settle title claims, as both parties thereto explicitly save their contentions and the proceeding is merely stayed. The sum here in issue is an expense relating to operations. Even if it were originally proper to defer the charge over a period of years, such a long time has elapsed since it was incurred that it should not now be included in the rate base.

[94] *Expense Incurred on Transmission Line Built by Others (1910-1913).*

The Staff proposes that there be excluded from the rate base the amount of $12,459.23 capitalized by Penn Water in connection with the construction of a transmission line from Holtwood to Lancaster (Pa.) which is the property of its customer company, Pennsylvania Power & Light Company (PP&L).

Approximately $9,000 of the amount represents costs connected with surveys made by Penn Water (1910-1911) with respect to its own construction of the line. The latter, however, abandoned the project and allowed options to expire. Later, the then customer, Edison Electric Company (predecessor of Pennsylvania Power & Light Company) built the line. The remainder of the $12,459.23 represents, for the most part, expenditures made during 1912-1913 by Penn Water in assisting the customer company to build the line, for which the customer was never charged.

As a result of this transaction Penn Water acquired no property or facilities and accordingly this expense is not a proper one for inclusion in plant or in the rate base.

Expense Incurred on Substation Built by Others.

The Staff also proposes that there be excluded the amount of $5,668.48 capitalized in connection with the construction of the PEPCO substation at Takoma Park (Md.) resulting in property used and useful to PEPCO.

[95] This expense represents engineering advice relating particularly to the design and selection of 220-kv equipment for the substation, with which the engineers of Respondents had had considerable experience, the latter being anxious that such equipment should be of the same standard as their own as it was to become connected with their transmission system. Respondents have never charged the customer company with the cost of these services.

As in the instance of the preceding "Expense Incurred on Transmission Line Built by Others", Respondents acquired no property by this transaction and possesses nothing with which "cost" can be associated. The amount will not be included in the rate base.

Loss on Materials and Supplies.

Respondents contend that a sum of $13,033.04 representing the difference between the balance in the Material and Supplies Account of McCall Company on July 17, 1909 and the McCall Company materials later inventoried by J. E. Aldred, Receiver, and Penn Water, represents (1) a loss of $8,970.34 because of the spoilage of 7852 barrels of cement written down by the Receiver to a value which was $1.1425 per barrel less than cost, and (2) a further net loss of undetermined material and supplies totaling $4,062.70. Respondents have no supporting detail other than the testified to possibility that most of the spoilage in cement occurred during the cessation period.

The staff's position is that the entire indicated inventory loss of $13,033.04 represents cement which deteriorated during the period of cessation and after December 31, 1908 when all construction activities had ceased.

[96] In support of its contention a staff witness testified that a physical inventory taken by the McCall Company at December 31, 1908 showed a total of 35,736 barrels of good cement on hand which at cost price amounted to $51,653, and that of this old cement the Receiver used only 7852

barrels and Penn Water a further 8626 barrels, leaving a balance of 19,258 barrels unaccounted for.

There is no evidence that the remaining barrels of this old cement were ever used in construction, but contemporary correspondence and staff testimony indicates that it was on hand but had spoiled.

The record supports the conclusion that the entire $13,033.04 here in question represents a loss due to spoilage of cement during the period of cessation and after construction had ceased and, in fact, that the loss probably was much larger. The amount here in dispute was never charged to construction on the books and the Respondents' proposal to now include it in such costs is not approved.

Cash Not Accounted for.

Respondents contend that $130.99 should be included in the rate base as cash lost from the petty cash fund during the period of construction.

This amount represents the difference between the petty cash funds reported on the books of McCall Company as of July 16, 1909, and the amount turned over to the receiver as of July 15, 1909.

This loss, never charged to plant on the books, possibly occurred during the cessation period and cannot, on the evidence in [97] this proceeding, be associated with the cost of constructing the project. It is found that no justification has been shown for including this amount in the rate base.

Susquehanna Contracting Company Expense.

Respondents contend there should be included in the rate base an item of $6,621.85, made up of miscellaneous administrative expenses, including legal fees, New York City and state taxes, referee's services, salaries, and printing and stationery, incurred in the formation, functioning, and dissolution of the Susquehanna Contracting Company, which company is described in the evidence as a "paper"

company incorporated to facilitate the development and financing of the McCall project and also as a corporation organized to provide for the mechanics of legally issuing the McCall Company securities and relieving Harvey Fisk & Sons from any possible future liability which might have resulted from the financing. Respondents have used both descriptions.

The administrative expenses of the Contracting Company could at best only be regarded as financing costs, and therefore [98] not allowable as a separate part of the rate base in view of the 6% interest allowance hereinbefore made.

Construction Fee Charged Holtwood Power Company (Affiliate).

Respondents contend for the retention in the rate base of an item of $50,194.73 which allegedly represents the cost of supervisory engineering services furnished by Penn Water, 1922 to 1924, in the construction of a steam power plant by the latter's affiliate, Holtwood Power Company. The amount of this fee is now in the plant account of Penn Water.[77]

The Staff takes the position that the fee represents a profit on an intercompany transaction.

Respondents' witness Gunn thought that the fee covered supervisory services rendered with respect to matters of preliminary development, design and construction for two and a half years prior to December 31, 1924, such services including those of Penn Water's then [99] assistant chief engineer, four other supervisors or engineers, the purchasing agent, and the accounting department, as well as other employees of Penn Water. This witness did not know how the fee had been determined as to amount. No records of the time, services, or salaries allocated to the steam plant were available to him. Respondents had no details in work-

77. Penn Water purchased the assets of Holtwood Power Company and merged the latter with itself in 1927.

ing papers or other records, and accordingly, he relied on information obtained by consulting Respondents' purchasing agent.[78] Gunn testified that Baltimore Company prepared some of the drawings and was consulted in the selection of equipment.[79] Another of Respondents' witnesses (Gisiger), however, testified that Baltimore Company did the main designing of the steam plant, Respondents' engineers making only minor modifications with respect thereto. The former witness (Gunn) was not in Respondents' employ at the time of this activity, but the latter (Gisiger) was.

There is no indication that this fee represents a distribution of the time of the supervisory employees named by Respondents' witness Gunn as being those whose services were involved in connection with the fee. In its tax return for the year 1924 Penn Water reported the fee as the profit in an intercompany transaction, and on that basis it was not included in taxable income.

It is clear from the evidence that the fee was nothing more than a flat 5% charge, that it constituted a profit between affiliates, and that the amount thereof should not be included in investment in electric plant.

[100] *Organization Expense of Holtwood Power Company (Affiliate)*

Respondents contend that an amount of $17,875.34 should be included in the rate base as the cost of organizing a corporation in 1924 with appropriate powers for the building and operating of a steam plant at the Holtwood site to be an integral part of Respondents' electrical system.[80] This amount is composed of the following items:

78. The agent died before the giving of the testimony with respect to this item.

79. Baltimore Company was paid $82,828.21 for direct expenses plus an amount of $16,565.78 for indirect expenses.

80. Respondent, Penn Water, had received legal advice that probably it did not possess this authority in its own corporate person.

Lancaster office expense (June 1924-August 16, 1925)		
Salary (Bushong)	$9,124.96	
Office salaries and expenses	5,760.53	
		$14,885.49
Legal services		
Fees	2,500.00	
Salaries and travelling (February 1925)	489.85	
		2,989.85
		$17,875.34

The Staff, in recommending that this contention be denied shows that Holtwood Power Company was in fact organized by Penn Water's lawyers (chiefly J. E. Malone and Simpson, Thacher & Bartlett), that the activities of Bushong and the Lancaster office constituted incidental part-time work of a clerical nature, that the claimed cost covered a period for a full year after the Company was organized, and that uncontested expenses contain ample provision for organization.[81]

[101] It has been pointed out in connection with other claims that Bushong was engaged in performing a variety of services during 1924-1925 and these were not limited to

81. The Staff here refers to the following Holtwood Power Company organization expenses which will be included in the rate base:

Promotion		
Record books, stationery and printing	$312.51	
Advertising, recording deeds, etc.	196.71	$ 509.22
Incorporation fees		6,201.12
Counsel fees		
J. E. Malone (Jan. 1, 1924—July 1, 1925)	12,500.00	
W. E. Haskell	310.00	
Stewart & Gerber	300.00	
Simpson, Thacher & Bartlett	3,070.59	
Notary Fee	.75	16,181.34
		$22,891.68

his land acquisition activity or his services in connection with the organization of Holtwood Power Company. He assisted in the organization of Holtwood Power Company and probably on a level higher than a merely clerical one, but such incidental service of operating employees should not be capitalized.

Respondents also fail to identify or explain either the items for office salaries and expenses or those for salaries and travelling as related to the organization of Holtwood Power Company.

The item for legal fees relates to services rendered by an attorney (Zimmerman) in the absence of Penn Water's regular counsel, J. E. Malone. Respondents' witness Gunn did not know the nature of Zimmerman's services, and the Staff's witness testified that the voucher covering these services did not describe them. Compensation for legal services performed in connection with organization are ordinarily allowable, but Respondents have made no showing that all of this attorney's services were rendered in connection with the organization of Holtwood Power Company or what portion of such services related thereto.

On the basis of the foregoing it is found that inclusion in the rate base of the amount of $17,875.34 would be improper.

Tower Foundations Abandoned.

Respondents contend that an amount of $3,595.95, consisting of expenditures incurred in the construction of four unused transmission tower foundations should be included in the rate base.

[102] The tower foundations were among seven the Respondents started to build in 1932 on rights-of-way procured for the projected Riverside line which was not constructed until 1937. Work on these foundations was ordered commenced to take advantage of the availability of a competent construction force in the vicinity at the time.

Respondents' witness Gunn testified that Respondents knew at the time of construction of the foundations that the use of several of them would be temporary. When the line was finally built only three of the tower foundations were used.

This expense essentially relates to abandoned work, and accordingly its inclusion in the rate base would be improper.

Items Previously Charged Operating Expense or Reserve for Depreciation.

Respondents propose to include in the rate base the sum of $96,116.84 obtained by reaccounting for expenditures formerly charged to the depreciation reserve or to operating expenses, after adjusting for certain recalculated overheads. Three categories of items are involved in the reaccounting: betterments in minor items, additions, and replacements including betterments in new units.

(a) *Betterments.*

Respondents contend that in the past there has been incorrect accounting for expenditures concerning 19 items of betterments arising in connection with minor items installed during the period from 1923 to 1931, in that at the time charges were incorrectly made to the depreciation reserve or to operating expenses in amounts of $14,813.34 and $11,339.99, respectively. The proposed adjusting entries consist of the total of the computed excess of the cost of such installations over [103] the cost of the old item trended to the year of installation by means of commodity price indices.

Except for one minor item (a sign) all the items here proposed for correction relate to necessary repair and maintenance work involving individual parts of equipment or structures such as transformer cooling coils, new rail siding, parts of a transformer oil circuit breaker, etc. (all charged to the depreciation reserve) and turbine lower

pedestal and rubber guide vanes, etc. (charged to operating expense). Respondents' witness Eichorn [Eichhorn], an accountant, admitted that, at the time of recording, the classification of such items as are here involved as a betterment was largely a matter of judgment, and the Staff's witness Newlands testified that these matters had been properly treated as repair and maintenance items at the time they were incurred according to then accepted accounting practice.[82]

Respondents' proposals with respect to this category clearly amount to re-accounting and the amounts related thereto should not be included in the rate base.

(b) *Additions.*

Similarly, Respondents contend that with respect to alleged additions there has been charged in error in the past an amount of $10,670.77 to the depreciation reserve, and an amount of $30,870.70 to operating expenses.

Respondents' witness Wetzel, who reclassified these items, testified that the determination of whether the item represented an addition involved the exercise of discretion and judgment. The Staff's witness Newlands testified that the original entries made on the books [104] for these transactions represented accepted accounting practice at the time of entry.[83]

These items were properly treated at the time of the original accounting as repairs and maintenance, and here, also, what Respondents are proposing merely amounts to re-accounting. Accordingly, the amounts proposed will not be included in the rate base.

(c) *Replacements.*

The final group for which Respondents propose to re-account relates to replacements (including betterments in new units) made from 1923 to 1936. The amount here in-

82. The original accounting was done under the State Commission's system of accounts then prescribed.

83. Penn Water was, during most of this period (1912-1935), subject to the accounting system of the Pennsylvania Commission.

volved totals $105,962.02, of which $13,341.75 would come from alleged past erroneous charges to the depreciation reserve and $92,620.27 from alleged erroneous charges to operating expenses.[84] Here, too, it is established in the evidence that the classification as a replacement rests upon judgment.[85]

These items represent the replacement of existing facilities at a time either prior to that when Respondents began recording retirements on their books or while the change to a retirement policy was being effected and Respondents were still charging the cost of replacement to the depreciation reserve or to operating expenses in lieu of the removal of the cost of the old facility from plant and the adding of the cost of the new. This was accepted accounting practice at the time, did not constitute error, and re-accounting at this time would be improper.

[105] (d) *Overheads.*

Respondents' proposed credit in the amount of $27,539.98 to retirements recorded prior to January 1, 1937,[86] includes interest during construction and other overheads which Respondents state that they believe are applicable to such retirements. However, the interest during construction and other overheads embraced in this proposed adjustment relate to amounts included in Respondents' contentions considered hereinbefore in other sections of this opinion and which, for the most part, have been excluded from the rate base. Therefore, it is found that the credit here proposed should not be permitted in connection with the determination of the rate base.

Respondents, in pricing certain unrecorded retirements, have included overheads not capitalized or allowed herein in the amount of $50,000.

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84. The adjustment would involve both debits and credits to the depreciation reserve, the net becoming a credit of $13,341.75.

85. The original accounting had been pursuant to a system promulgated by the Pennsylvania Commission.

86. The effective date of the Commission's Uniform System of Accounts and Respondents' compliance with Electric Plant Instruction 2-D.

It follows that the amount in question should not be treated as a part of the cost of plant retired since it has not been considered a part of the cost of plant in the first instance. Therefore, the proposed credit is eliminated.

Contribution to Holtwood Church.

Respondents propose to include in the rate base an amount of $1,400 contributed in 1913 by Penn Water to the construction of a church at Holtwood (Pennsylvania) and previously accounted for as a charge to surplus.

This donation, made after the commencement of operations, was properly an income or surplus charge and not a proper charge to Penn Water's plant.

[106] *River Coal Investigation Expense.*

Respondents claim as includible in the rate base an amount of $6,132.41 representing "River Coal Investigation Expense", consisting of expenses incurred in connection with obtaining an engineering report on Susquehanna River coal, and in increasing the coal storage area and coal storage facilities of Anthracite Production Corporation.

The expense connected with the engineering report ($2,500) was incurred June 1920 and covered a survey of the history of river coal, its recoverability and marketability, as well as the determination of a location of a plant to be used in the recovery of such coal. Within four months thereafter, Holtwood Coal Company was organized as a wholly-owned subsidiary of Penn Water for the purpose of engaging solely in the commercial marketing of river coal. The coal recovered was dredged by the non-affiliate Anthracite Production Corporation, which located its plant as recommended by the aforesaid engineering report, at Shenk's Ferry (Pennsylvania). Subsequently, the market for the sale of coal by Holtwood Coal Company disappeared, and at the end of 1923 it withdrew from the business.

Although Penn Water expended some $23,000, which is included in the rate base, in an investigation of river coal

deposits, combustion characteristics of river coal, etc., in connection with the construction of its steam plant, it proposes here to charge an additional $2,500 to cost of the steam plant for expenses associated with the earlier report obtained in connection with the 1920 commercial marketing operations of Holtwood Coal Company. This non-utility expense is not a proper rate base item.

The proposal to include as steam station costs expenses ($1,340.98) incurred in connection with labor and material provided [107] Anthracite Production Corporation at the latter's coal storage facilities at Shenk's Ferry in 1921 and 1922, as well as the proposed inclusion of the amounts of reimbursement ($2,291.43) to Anthracite Production Corporation by Penn Water for the cost of moving transformers and a transmission line, and the building of a new office, laboratory and machine shop, also relate to Penn Water's non-utility business and should not be included in the rate base.

Respondents' Proposed Credit Adjustments.

Respondents propose to reduce claimed costs by the amount of $9,187.79, representing the rental income received from Transmission Company's Gunpowder line (Baltimore) during the period prior to the commercial operation thereof.

Penn Water also proposes to eliminate from plant account (1) $941.69 appearing in the flowage basin account (1910-1924), (2) $399.59 appearing in the flowage basin account (1925-1936), (3) a bond interest adjustment made in 1914 in the amount of $587.86, and (4) an item of Holtwood Power Company organization expense in the amount of $799.69, all totalling $2,731.83.

Penn Water further proposes to write off the value of stock of McCall Ferry Company [87] acquired by McCall Company from Hutchinson in the amount of $200.

87. Not to be confused with McCall Ferry Power Company (McCall Company).

The credit for the amount of rental received from the Gunpowder line, as well as the other credits totalling $2,931.83, appear to be proper in determining the rate base.

[108] *Summary.*

The foregoing findings relating to investment in electric plant in service and, therefore, to the rate base are summarized as follows:

Net amount in issue		$3,378,869.57
Less amounts to be included in the rate base:		
Triangulation survey and property ties	$ 6,495.96	
Additional interest during construction (January 1, 1911 to June 30, 1911)	192,789.00	199,284.96
Subtotal		$3,179,584.61
Respondents' proposed credits:		
Gunpowder line	9,187.79	
Other	2,931.83	12,119.62
Subtotal		3,191,704.23
Net exclusions from rate base conceded by Respondents		2,208,902.08
Total adjustments to electric plant in service		$5,400,606.31

This adjustment applied to the book amount of Electric Plant in Service and in Process of Reclassification produces an adjusted book amount, as of December 31, 1945, of $33,183,625.82.[88] This latter amount includes $75,722.25,

88. Electric Plant in Service and in Process of Reclassification, $38,584,232.13, less total adjustments, $5,400,606.31, equals the $33,183,625.82.

representing the book cost of certain real estate held for possible future transmission lines which should not be included in the rate base but should be recorded in Electric Plant Held for Future Use. The $75,722.25 deducted from the above adjusted book amount of $33,183,625.82 leaves a balance of $33,107,903.57.

[109] *Disposition of Amounts Improperly Charged to Plant.*

The amount of $11,946,831.77 was charged to plant account on the books of Penn Water to record the transfer of properties on January 13, 1910 from the Bondholders Committee of McCall Ferry Power Company. The amount recorded represented the face and par value of the securities issued to the Committee, less the net amount of miscellaneous assets and liabilities. The following adjustments are appropriate for disposing of the improper or incorrectly classified items as recorded on the books at December 31, 1945, totalling $5,400,606.31:

131	Materials and Supplies Estimate of the portion of sundry spare machine and equipment parts on hand at December 31, 1945.	$ 14,000.00
151	Capital Stock Expense Expenses in connection with the authorization, issue and sale of capital stock during the period 1923-1935.	82,963.12
250	Reserve for Depreciation of Electric Plant The net amounts of $335,728.20 representing unrecorded retirements and $122,488.49 of plant cost erroneously charged to the reserve for depreciation.	213,239.71

110	Other Physical Property Real estate determined by Penn Water to be outside the claimed project boundary and the investment of Penn Water in the hydraulic testing laboratory.	46,221.15
271	Earned Surplus The net amount of various remaining items representing improper charges and credits to fixed capital accounts.	5,044,182.33
	Total elimination from electric plant	$5,400,606.31

The project boundary claimed by the Respondents has not been investigated by the Staff or passed upon by the Commission. The extent and value of the properties proposed to be transferred herein to Other [110] Physical Property and Electric Plant Held for Future Use represent the Respondents' determination and are subject to future action by the Commission when the project boundary is established.

Construction Work in Progress.

The Staff recommends adding to adjusted plant, and to the rate base, construction work in progress in the amount of $32,119 for 1945 and $64,353 for 1946. Respondents contend that $237,361.79 of construction work was in progress for 1945 [89] and $226,672.07 for the year 1946. The recommendation of the Staff coincides with net additions permitted as an element in the computation of the power bill to Baltimore Company under the contract of June 1, 1931. Respondents' contention relates to a total of annual work orders which may be classified into four groups: (1) non-project property, (2) property held for future use,

89. This represents $205,243.01 recommended for exclusion by the Staff

(3) work in progress not included in the year's power bill, and (4) work in progress included in the year's power bill, as follows: [90]

	1945	*1946*
Non-project property	$ 52,140.33	$ 58,921.19
Property held for future use	67,848.06	67,848.06
Work in progress not included in power bill	85,254.62	35,549.75
Work in progress included in power bill	32,118.78	64,353.07
	$237,361.79	$226,672.07

[111] Non-project property includes the purchase of properties above both the Holtwood and Safe Harbor projects which is being held for use in connection with a future hydro development. Neither the specific location of the future development, nor the design, nor the date of the commencement of construction thereof has yet been determined, nor, in fact, can this development be used as a part of the Holtwood project and may not even be owned by Respondent, Penn Water.

Property held for future use consists principally of land items. The largest item relates to rights-of-way for a proposed line from Lehman Farm to Lancaster with some investment having been made for a line of less definite destination. It has not been decided when construction will begin on these lines and no contract has been closed with a customer requiring their construction.

With respect to the two remaining items contained in the foregoing tabulation, Respondents capitalize interest during construction under a definite policy which has been in effect since 1930, according to which interest is charged at ½% per month on construction expenditures with respect to all jobs estimated to cost $2,000 and to require

90. Non-project property and property held for future use are not included in the power bill.

more than one month in construction. This capitalization continues until the end of the month, during which the addition or facility becomes available for service, whereupon the cost of the work is included in computing the power bill.

According to the evidence, therefore, it is proper to allow as a part of the rate base only those of the foregoing items which are included in the power bill and the remaining items claimed are not to be included in the rate base.

[112] *Property Held for Future Use.*[91]

Respondents contend there should be included in the rate base an amount of $77,918.28 as representing property held for possible future use in respect to the construction of a new Lancaster transmission line and substation, lines parallel to Respondents' Perryville, York and Coatesville lines, a connection with the system of Pennsylvania Power & Light Company (Lancaster), and construction of lines parallel to Respondents' Ellicott City (Maryland) to Takoma Park (D. C.) lines, as well as future additions to the Ellicott City substation. In the testimony the estimated date of placing in service of these facilities varies from 1950 to 1955 to the unknown.

Purchases for the possible future line between Safe Harbor and Lancaster, which represents the major portion of this property, began in 1924 and are still in progress. The date when this line is to be built is undetermined.

Rights-of-way paralleling existing lines of Respondents were acquired at the time the transmission lines were constructed and there are no definite plans as to the date of their use.

Such items relate to matters which are too indefinite to justify consideration of the related amounts as a part of Respondents' rate base.

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91. Other property being acquired currently to be held for future use is disposed of under the previous section, "Construction Work in Progress".

[113] DEPRECIATION.

There are three main aspects of depreciation which must be considered in this proceeding: (1) accrued depreciation to be deducted from cost of plant if a depreciated rate base is used, (2) annual depreciation expense, and (3) whether a depreciated or undepreciated rate base is appropriate.

Accrued Depreciation.

Respondent contends that the accrued depreciation as of the end of 1945 amounted to $6,000,000. The staff claims the amount was approximately the same as the depreciation reserve according to the books (adjusted) of the company, namely, $8,763,118.

The difference between the two foregoing figures represents, in the main, differences in method of determining accrued depreciation. Respondent's witnesses determined so-called actual depreciation of approximately $4,500,000, largely by the observation process, to which was added $1,500,000 as a "safety factor" to cover possible future loss from accidents, failures, floods, ice, hurricanes, sleet, snow, earthquakes, and the like. The staff, on the other hand, estimated accrued depreciation on the age-life, straight-line basis. This involved an estimate of the service lives of the various classes of plant and then a computation of the proper depreciation reserve, sometimes called the reserve requirement, which was taken as the measure of accrued depreciation.

Respondents' witnesses Gunn and Uhl testified that the "actual" depreciation in Respondents' depreciable property as of December 31, 1945 was as follows:

[114]

	Gunn	*Uhl*
Production Plant—Steam	$ 973,310	$ 955,370
Production Plant—Hydro	2,223,880	2,480,350
Transmission Plant	1,147,290	872,050
General Plant	200,420	172,360
	$4,544,900	$4,480,130

The agreement in totals testified to by these two witnesses should not be construed as agreement to details or to procedures. Only by the sheerest of coincidences could the determinations of these two witnesses approximate one another so closely. They disagreed in major respects not only to the presence or absence of functional depreciation, but also as to physical condition. To cite one example, Gunn estimated $326,760 for depreciation in Accessory Electric Equipment, whereas Uhl found only $226,020. Over 50% of Gunn's estimate represented obsolescence, whereas only 15% of Uhl's estimate came within that category.

The witness Gunn's method involved the determination of physical condition and the "comparative economic disadvantage" existing in any unit of property. Physical depreciation was based on studies of plant maintenance, test, inspection and operating records, consultations and studies, and was expressed by a per cent condition. "Economic disadvantage" was determined for individual units of equipment by comparing charges or costs applicable to the existing unit against charges or costs for a substitute unit of the most modern design to provide equivalent capacity, reliability and flexibility. He made substitute plant studies for the hydro and steam stations, the Holtwood and Highlandtown substation[s], the Holtwood-Highlandtown transmission line to Baltimore, and general plant, but not as to the rest of the property which he considered modern. [115] Gunn testified that the greater part of the property of Respondents was of a rugged, long-lived character for which there were few, if any, life statistics, that there were no mortality data available with respect to large hydroelectric equipment and structures, and that he did not use service lives, as in his opinion the results obtained thereby would bear no relation to existing depreciation except by coincidence, even if a series of adjustments were made, from time to time, until life expired.

In determining physical depreciation, however, Gunn used a time discount factor. But, when cross-examined with respect to specific instances in which the factor had entered into his determinations, he was very uncertain and indefinite as to what weight he gave it other than (1) he associated it with future usefulness, which apparently related to a consideration of life expectancy over a possible range of years, and (2) he "observed the effects of interest off of some compound interest curve" assuming that "technological depreciation" would proceed at a certain "rate". He confessed that this "time discount" factor was "far out in the realm of speculation" and depended on the exponent used, but he insisted it was entitled to some consideration and testified that, in fact, he did make estimates of depreciation based upon it and that he could not make an "accurate determination of . . . depreciation" without it.

Gunn's "economic disadvantage" produces a result dependent upon price levels through the effect of prices on current operating expenses of existing property and assumed operating expenses and capital costs of alternative or substitute property. Moreover, it was necessary for the witness, in order to carry out his method, to make judgment [116] determinations of what property was subject to "economic disadvantage" and then to speculate as to what would be the costs of building and operating substitute plants. In this connection, he obtained carrying charges by use of a factor developed 20 years ago, which he did not check for adaptability for current use, and which contained an element of return not appropriate in this proceeding, and an element of depreciation in no way related to his own method of determining depreciation. He estimated suppositious operating and maintenance savings and even assumed a value of power and energy losses that might be saved by modernization of substations.

Such consideration as Gunn gave to the economic aspects of depreciation is included in a method of determin-

ing economic disadvantage which has all of the speculation and faults of "reproduction new". His judgment of physical depreciation, as previously pointed out, is compromised, in major instances at least, by the use of a vaguely defined and vaguely used time-discount factor. It is necessary to conclude, therefore, that this witness' determinations are too speculative to be of real assistance to the Commission in determining accrued depreciation.

The witness Uhl also had available reports of an examination of structures and equipment, inspection and maintenance, maintenance expense history, and data on additions and retirements since the original construction. This witness estimated the per cent condition of structures and equipment, allowing for wear and tear, improvements and replacements, current and deferred maintenance, reflecting the "depreciation" (actually only deferred maintenance) that would be eliminated by Respondents' current maintenance policy, and stated that [117] he considered obsolescence where found. As did Gunn, he considered the mass concrete of the dam, the forebay ramp, the tail-race excavation and deflection wall, and sub-structure excavations as non-depreciable [92] but used the essentials of a service-life calculation to obtain an estimate of the deferred maintenance in the dam.[93]

Witness Uhl gave no real consideration to obsolescence, testifying that the current high cost of replacements made it impossible for him to make a good estimate and that he considered it as a very intangible element, depending, even in power plants, upon style and type as well as upon economic factors.

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92. Also, the railroad relocation, land and flow rights, reservoir clearing, and organization and undistributed fixed capital costs. Deferred maintenance was found in such principal items as the dam, the turbines and gate mechanisms and the windings of generators and transformers and was included as depreciation. He distinguished between current and deferred maintenance, considering maintenace to be deferred if its periodicity was as much as 3 years, but admitted that in some instances, as the operators' village, it became mixed with improvements. He made no determination as to exactly what part of his determination of depreciation related to deferred maintenance alone.

93. Also in determining depreciation in conductors, line towers, the frequency converters, and transformers.

While Uhl stated that he gave consideration to the fact that some depreciation existed due to deterioration that could not be found by visual examination, it is nowhere apparent in the evidence what [118] weight he gave to this factor as it is obvious that he gave principal consideration and weight to "the physical condition of the property", as he found it.[94]

In essence, both Gunn and Uhl determined their so-called actual depreciation by the observation process, although Gunn, in particular, through generalizations and technical descriptions, endeavored to create the impression that his was a scientific study. To this so-called actual depreciation of some $4,500,000 was added the $1,500,000 previously noted and which witness Gunn admitted was not depreciation at all but merely a provision for some kind of contingency in the future.

We have, on many occasions, carefully considered testimony endeavoring to establish observed depreciation as actual accrued depreciation and have condemned that method so many times that it would seem to be futile to repeat what we have already said.[95] Suffice it to state here that the record in this case, just like the record in the *Safe Harbor* case, shows beyond any question of a doubt that such observed depreciation cannot be accepted as a measure of accrued depreciation for rate base purposes.

[119] The staff proceeded to determine accrued depreciation by the use of the straight-line, age-life method which involves the use of service lives, the same method employed by the Company in computing annual depreciation expense since it started depreciation accounting. Since 1931 the

94. The further criticism that physical depreciation cannot be wholly determined by visual inspection is strikingly borne out by Uhl's admissions that important elements of property were not capable of inspection and that he had to return and make a further inspection of the substructure of the hydraulic plant during the course of the hearing.

95. In the matter of

Chicago District Electric Generating Corp., 2 FPC 412, 423 (1941);
Hope Natural Gas Company, 3 FPC 150, 167 (1942);
Safe Harbor Water Power Corporation, 5 FPC 221, 250 (1946).

amounts of depreciation expense accrued in its books have, in effect, been collected from customers inasmuch as the Baltimore Company, under the supplemental agreement of June 30, 1931, was required to assure the company recovery of all of its proper expenses, including depreciation, in addition to a return on investment. Most of the present reserve was built up by accruals for which the company was specifically reimbursed under the foregoing supplemental contract since the depreciation reserve, as of December 31, 1930, amounted to only $2,875,440.89.

The first step in determining accrued depreciation under the straight-line method is a determination of service lives of the various units or classes of plant. The staff witnesses who estimated service lives did so after a field examination of Respondents' properties and a study of Respondents' operation, inspection, maintenance and trouble reports, and a consideration of functional (economic) as well as physical causes of plant retirement. Respondents did not offer any evidence in respect to service lives. We find in the record in this case that the service life estimates of the staff are reasonable and that they are, therefore, approved.

After a determination was made of the service lives, a proper depreciation reserve (reserve requirement) was computed by the staff. This reserve requirement represented, in terms of cost, that part of the service life of the properties which had expired or, in other words, [120] which related to the past. The method was substantially the same as that employed by the company in its accounts since it inaugurated depreciation accounting. The reserve determined by the staff, as of December 31, 1945, amounted to $8,408,373, as compared with the adjusted book reserve of $8,763,118 as previously noted. The book reserve was somewhat higher than the reserve requirement, the difference being primarily due to the fact that the book reserve contains allowances for resurfacing the dam and a few

other deferred maintenance items not included in the staff estimates.

It is now well-established that depreciation expense and accrued depreciation should be determined by the same method in order to do justice to rate payers and the company alike. The use of one method, such as observed depreciation, for determining accrued depreciation, and an age-life method for the purpose of depreciation expense, is the use of dual standards which inevitably results in injustice. We stated in the *Cape Harbor* case, where the issues in respect to depreciation were similar to the issues presented here, the straight-line method is now the generally accepted method of computing depreciation. The staff procedures in this case conformed to our well-established precedent.

There is disagreement between Staff's and Respondents' witnesses as to whether certain plant items (mass concrete of the dam, the forebay ramp, the tail-race excavation and deflection wall, and sub-structure excavations) are depreciable or non-depreciable, but Respondents' own witness Uhl admitted that it is the practice to put a life upon such structures as concrete dams and that he would consider them, and specifically, the Holtwood dam, as depreciable. The [121] Respondents themselves, since 1917, have accrued amounts to the reserve for depreciation for all of its depreciable plant, which included the dam, according to the straight-line method.

It is of evidence in the record of this proceeding that other electric companies treat comparable mass concrete dams as depreciable, some of the companies calculating the accrual on a straight-line basis, giving the dam account a service life ranging from 100 to 141 years.

In our opinion such plant items as are mentioned above have a limited service life and are properly subject to depreciation allowances in order to prevent the impairment of capital. We believe that the general practice of treating such property as depreciable is clearly correct and that the

novel treatment proposed by Respondents is not sound from either the financial or regulatory viewpoint.

Upon a consideration of all of the evidence it is found that reasonable and proper composite service lives for the steam, hydraulic, transmission and general plant classifications are 42, 69, 57 and 35 years, respectively, with corresponding annual depreciation rates of 2.38%, 1.45%, 1.75% and 2.86%. We find that the average accrued depreciation for 1946 was $9,001,873.

Depreciation Expense.

Respondents contend that the required annual charge for depreciation expense is $400,000 for property in service, plus 2½% on subsequent net additions of depreciable property. The Staff contends that for 1946 the proper annual charge for depreciation was $465,413, computed on a straight-line basis.

[122] Respondents' witness Gunn derived his estimate of the adequate annual allowance of $400,000 by applying to the 1945 book allowance for depreciation, $574,245, the ratio of his determination of the proper reserve at the end of 1945, $6,000,000, to the December 31, 1945 book balance in the depreciation reserve, $8,976,358, and increasing the result to $400,000 after consideration of several intangible counteracting factors.[96]

His recommendation of $400,000 is upon an equal annual (straight-line) basis, which he modified to an annuity of $175,000 if the annual allowance were on a 3% compound interest or sinking fund basis. Anticipating a net increase in the property of Respondents in the future, consisting of replacements and miscellaneous minor additions, both of

96. He testified that he verified this annual allowance by reviewing the present physical and economic condition of Respondents' plant, concluding that retirements for the next ten years may approximate $250,000 a year, permitting the retirement of 1/10 of all of Penn Water's depreciable property including such possibilities as the retirement of 2/3 of boiler plant equipment, 1/2 of all coal preparation and handling equipment, and all of the coal dredging and floating equipment, and rewinding all 10 generators in the hydro station, and all transformers in both the Holtwood and Highlandtown substations, etc.

which he expects to consist of units of property more susceptible to depreciation than the average of the property as a whole (i. e., carrying higher rates of depreciation), he added to his $400,000 an allowance of 2½% per annum applicable to net additions of depreciable property, assuming a straight-line basis of accumulation, or an allowance of 1.3% per annum, assuming depreciation be provided on a 3% interest basis. The $400,000 includes no allowance for obsolescence or what the witness called "economic disadvantage" in the future, except that which might be irregularly provided for at the time of the 5- and 10-year review advocated by the witness as a check of the accumulated reserve against then past experience in the way of retirements.

[123] It is apparent that even under Respondents' theories the derivation of the $400,000 can only be sustained by validation of the witness' use of the ratio of his determination of the reserve requirement to the book reserve. Having found that the witness' determination of the reserve requirement cannot be accepted, no basis exists for accepting his determination of the annual allowance.

Moreover, the procedures followed are impracticable and unsound. In our opinion the $400,000 annual allowance would be inadequate to return the investment in presently-owned depreciable property to respondents over the service lives of such properties, but on the other hand, the 2½% of depreciation to be applied to additions appears excessive. The combination of the two figures conceivably might result in a fair allowance over a period of years, but obviously this would be the result of accident rather than of sound practices.

The Staff's computations of the annual allowance conformed to the standard practice of applying the depreciation rates hereinabove found proper to the average of the appropriate plant balances for the year. Making this application to the average plant balances for the year 1946, it is found that the proper annual allowance for that year

is $467,701, including $2,288 applicable to the sums allowed herein with respect to triangulation and property tie surveys, and the allowance of additional interest during construction, less Respondents' proposed credits.

[124] *Depreciated or Undepreciated Rate Base.*

Respondents contend for an undepreciated rate base with a special credit to consumers, computed at 3% on their revised depreciation reserve balance of $6,000,000, plus subsequent net additions thereto.

The evidence relied upon by Respondents in support of this contention consists of the testimony of the witness Dorau, which sums up to the effect that in order for the stated return on investment to be fully realized, there must be a so-called proper correlation between the effect of the reserve deduction, where the deduction is made, in determining the rate base, and an upward adjustment in the allowed rate of return; or, the same result achieved by not deducting accrued depreciation and allowing a credit to consumers, based upon the amount in the reserve and a given interest rate. Thus, with straight-line accrual, deduction of the reserve, and no income from "reserve investments", the witness contends that in order to realize an "intended" fair return at the rate of 6½% (as assumed by him), there would be required an actual rate of return of 9.27%. On the other hand, with 3% earned on the "reserve investment", the rate of return actually realized would be 5.45%; on a 3% sinking-fund basis, with an undepreciated rate base and earnings on the "reserve investment" at 3%, the rate of return realized would be the witness' intended rate of 6.5%.[97]

[125] This concept of maintaining a "reserve investment" as if it were an actual fund is emphasized by Respondents'

97. As this Commission has comparatively recently pointed out in the *Safe Harbor* case, *supra* (5 FPC 22[illegible]248-249), the use of a sinking-fund method with a rate of interest applicable to the sinking fund, lower than the rate of return allowed on the investment, has the effect of not crediting the consumer with the full amount of the investment which is repaid by him in the form of depreciation expense.

contention that (1) reserve assets are in the nature of advances made by the consumers, which cannot be remitted to Respondents' investors until such investments are no longer needed to insure dependable service to the consumer, and further that (2) the deduction of the reserve would operate to effect a lower return, thereby relieving the consumer of paying for a part of the cost of service (the cost of Respondents' custody and management of the reserve) at the same time depriving the investor of a part of his return on the investment.

Dorau's approach is fallacious in several respects. So-called depreciation reserve assets—they are not identified as separate assets at all—are accumulated from rates paid by consumers but they do not in fact or in theory constitute a *corpus* of a trust fund such as is implied in Dorau's testimony. Whatever funds come into the possession of the utility through allowance of depreciation expense belong to the utility absolutely and may be used for all lawful purposes. Such unidentified funds can be used to pay off debt, purchase additional property, etc. If they are invested in utility plant, the plant is included in the rate base but if invested in such things as stocks and bonds, obviously rate regulation does not take them into account.

The trust fund analogy is strained to say the least. Accrued depreciation is not a fund. As previously stated, it represents that part of the cost of plant which relates to the past—expired service life. If it is not deducted in determining the rate base, a cost of past operations becomes the basis for a continuing charge. [126] In addition, accrued depreciation is deducted on equitable grounds. When a consumer has paid for plant consumption (depreciation), it is just as inequitable to charge a return on the amount reimbursed as it would be to charge a return on the cost of coal consumed in a previous year and duly recovered in operating expenses.

Respondents contend that, because of the long-lived character of their property, the depreciation reserve will

tend to accumulate to abnormal proportions, becoming and remaining for years in excess of 50% of the investment in depreciable property under the straight-line method. Assuming such computations to be accurate, the results thereof do not constitute a valid argument, *per se*, against the straight-line method and the employment of a depreciated rate base. The fact is that in the instance of Respondents, whose property is largely long-lived, the use of a sinking-fund method (usually associated with an undepreciated base) would postpone recoupment of a high proportion of their investment to the remote time when the properties are old, maintenance high and obsolescence a greater hazard. This would entail greater financial risks and might result in serious capital impairment.

We discussed in the *Safe Harbor* case the contention that an electric utility like Penn Water should employ the sinking-fund method of depreciation and enjoy an undepreciated rate base. The record in this proceeding does not alter what we there said, but no good purpose would be served by repetition.

[127] It is, therefore, concluded that the use of a depreciated rate base in this proceeding is proper. It is also our opinion that where the book reserve approximates the proper reserve (reserve requirement), the book reserve should be deducted as the measure of accrued depreciation. That is the situation here, the book reserve is only slightly higher than the reserve requirement and even the excess represents payment to Penn Water by its customers for deferred maintenance.

Accordingly, we find that from Respondents' average investment in plant for 1946, $33,126,585, the reserve for depreciation, averaged for the year $9,001,873, should be deducted in arriving at the 1946 rate base.

[128] WORKING CAPITAL.

Respondents contend that an adequate allowance for working capital requires the allowance of an amount of

$977,160, while the Staff contends that an allowance with respect thereto in the amount of $650,000 would be adequate.

Respondents contend that the required amount of the cash component of such an allowance is a sum of $488,092. However, the method used by Respondents in computing the amount claimed for this component is based upon several fallacies. The lag between expenditures and revenue is computed by Respondents on the theory that cash should be on hand the first of a month to meet all of that month's expenses and that revenues are not due until the various contract dates of payment, without any consideration of the fact that bills are not received on the first of the month, that operating expenses are not paid on the first of the month, that payrolls are paid twice a month or bi-weekly with little necessity for interim wage payments, and that bills usually either carry a ten-day discount or a 30-90 day payment provision. Accordingly, Respondents' use of a 48-day lag in terms of weighted dollars in this computation is not acceptable.

Further, Respondents' calculation of the cash component includes an allowance for contingencies such as floods, fires, etc., in the amount of $125,000, though in determining this amount no consideration was given by Respondents to their year-in and year-out actual contingency requirements, nor to the fact that the operating and maintenance element of such a casualty expense would be recouped in the monthly power bill [129] rendered by Respondent to Baltimore Company. Such vague over-all contingencies, however, are not properly provided for in this kind of an allowance.

Again, with respect to this same component, Respondents have included as a part of their operating expenses an allowance for rate case expense in the amount of $126,000, without regard to "periods of repose" or to the fact that, subject to the rights of the parties under the agreement of

June 1, 1931, Penn Water may include rate case expense as a part of the monthly power bill rendered Baltimore Company.

The Staff's contention that an adequate provision for the cash component would be an amount of $256,644 is based on the use of a 45-day period of lag between expenditures and revenue. The actual average period of lag, based upon the dates upon which the Respondent, Penn Water, actually receives payment from its customers, is only 25-35 days. The Staff's contention is also based upon the semi-monthly or bi-weekly character of Respondents' salary and payroll payments, and a ten-day discount period for the payment of materials and supplies. The Staff has excluded from the computation reflecting its contention the cost of purchased power, which is paid for after revenues are received; taxes, which are also paid after revenues are received; and depreciation expense, which does not represent a cash expenditure.

It is found that the amount of $256,644 represents an adequate amount for the cash component of a working capital allowance.

The tolerances provided in the 10-20 day margin between experienced lag and an allowed 45-day lag, and in the fact that Federal [130] income tax expense is an item on the monthly bill rendered Baltimore Company though payable by Penn Water only quarterly in the following year, appear to be sufficient for the maintenance by Respondents of minimum bank balances and for provision for average contingencies.

Respondents contend that an amount of $489,068 is required for the materials and supplies component including river coal in storage. Respondents' computation of the materials and supplies requirement, exclusive of river coal, is based upon a partial write-up of 1945 requirements, made on the basis of an assumed increase of 15% in the cost of purchased goods. The amount Respondents contend is re-

quired to cover river coal in storage is based on the averaging over 5 years of net tons in storage at the close of the annual dredging season, an estimated increase in cost of production in 1946 of 15%, and the addition to allocated general and administrative expense, including all general officers' salaries, rate case expense, and legal expense.[98] Respondents make no allowance for the fact that general and administrative expense is subject to monthly recoupment in the power bills to Baltimore Company. This component, as claimed by Respondents, is inflated, both because of the use of the average amount of coal in storage at the end of the dredging season,[99] and because an improperly computed unit price has been applied to the tonnage of such coal. This determination of the material and supplies component accordingly is not acceptable.

[131] The Staff contends that an allowance for materials and supplies (including coal on hand) of $396,421 is adequate. This is based upon a 12-months' average of total materials and supplies for the year 1946, and includes an average monthly inventory of coal.

The recommendation of the Staff as to the materials and supplies component is reasonable and is supported by the evidence.

The amount of $650,000 is herewith allowed in the rate base as Respondents' working capital requirement.

Net Investment Rate Base.

On the basis of the evidence in this proceeding and the foregoing findings and conclusions it is further found that the consolidated net investment rate base for Respondents for the year 1946 is as follows:

98. Although the full amount of general and administrative expense was previously included in calculating the cash component.

99. Respondents' average of 52,414 net tons in storage at the beginning of the non-productive period (i. e., the closing of the dredging season in December) compares with an average monthly balance of coal in storage, for the same 5 years used by Respondents, of 38,961 tons.

	1945	1946
Plant in Service and in Process of Reclassification (per books)	$38,584,232	$38,525,105
Adjustments to Plant in Service and in Process of Reclassification	5,476,329	5,476,310
As Adjusted	$33,107,903	$33,048,795
Construction work in progress	32,119	64,353
Total	$33,140,022	$33,113,148
Average for 1946		$33,126,585
Average depreciation reserve		9,001,873
Average net investment		$24,124,712
Working Capital		650,000
Net investment rate base for 1946		$24,774,712

[132]

RATE OF RETURN.

Upon a careful review of the extensive evidence of record in this proceeding which deals with the subject of rate of return, and applying the principles controlling the determination of a proper rate for utilities as enunciated by the Supreme Court,[100] it is found that a rate of return of 5¼% for Respondents is fair and reasonable.

Respondents contend that their fair return requirement is a gross figure of $2,450,000, the approximate result of applying a so-called over-all replacement cost rate of 5.6% to an undepreciated original cost rate base adjusted upward for present costs or prices.[101] Respondents further

100. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 693; *United Railways* v. *West*, 280 U. S. 234, 251.

101. To determine the amount of the fair return requirement, Respondents' witness Foster applied his current cost of 5.6% to a rate base consisting of (1) Respondents' contended-for consolidated original cost as of December 31, 1946, plus (2) 42.6% (witness' computed present proportion of

contend that if an undepreciated original cost rate base be used, without adjustment for price changes, the rate of return allowed must be 6.5% in order to enable the realization of the required gross amount of $2,450,000. To obtain the same gross amount on the basis of a net investment rate base of $24,774,712, Respondents would have to be permitted to earn an over-all rate of nearly 10%.[102]

[133] The Respondents' witness described two bases of rate making which he indicated would induce the investment of capital in regulated enterprises, one of which he defined as the "competitive replacement basis", the other as the investment cost basis. He relied, however, only upon the former. In his computations he applied a rate which he testified represented the current (competitive) cost of obtaining capital to a base which he testified represented the current (competitive) cost of plant in terms of first a substitute plant and again in terms of the trended cost of Respondents' physical properties. The witness' method involves the attempted injection of speculative reproduction cost through the back door, i. e., rate of return testimony. It cannot be accepted.

Respondents are very little subject to even the ordinary risks of an electric operating utility. Penn Water has a ready market for all of its power, possesses strong power contracts, and is in a very favorable financial position. The contract with Baltimore Company assures Respondents of a stabilized income on a basis prior even to the return to the holders of the common stock of Baltimore Company. The witness Foster conceded that Baltimore

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equity capital) of the difference between original cost and the nominal dollar investment adjusted for changes in purchasing power of the dollar to 1945, plus (3) the Respondents' contended-for working capital allowance ($977,160). The foregoing, though properly excluded from evidence, remained the basis of the witness' determination. The witness also checked by making other similar computations, using 42.6% of the difference between said consolidated original cost and the cost of a substitute plant, and 42.6% of the difference between such consolidated cost and the trended original cost; also making three somewhat similar calculations with a more economical equity capital proportion of 25%.

102. The witness did not concern himself with whether depreciation should be deducted, nor did he give consideration to the matter of giving a credit to consumers.

Company was generally a strong company and was regarded by investors as having better than average prospects so far as income stability was concerned. The degree of Respondent Penn Water's income stability is manifested by the fact that during the depression years following 1929, Respondent, Penn Water, maintained its common stock dividends at $3 per share without change, and Baltimore Company, likewise, avoided having to put into effect any reduction in dividends, while dividends paid by certain other electric operating utilities did decline.

[134] The Respondent, Penn Water, had outstanding, December 31, 1946, $10,068,000 of refunding mortgage and collateral trust bonds (3¼%) issued in 1939 and due in 1964, and $10,245,000 of refunding mortgage and collateral trust bonds (3¼%) issued in 1940 and due in 1970. There was also outstanding at the end of 1946, 21,493 shares of $5 cumulative preferred stock (no par), and 429,848 shares of its common stock (no par).[103]

Respondent's outstanding 3¼% bonds, series of 1964 and 1970, are widely distributed and admitted to unlisted trading on the New York Curb Exchange. The series of 1964, in the principal amount of $10,900,000, offered in 1939, was issued at a premium and on a yield basis of 3.02% and at a cost rate to maturity of 3.20%. The series of 1970, in the principal amount of $10,962,000, offered in 1940, was issued at a premium and on a yield basis of 3% and at a cost rate of 3.14%.

The series of 1964 is now callable at 105.5%, and the series of 1970 at 106.5%. Undoubtedly the possibility of call has prevented the yields on these bonds from following the downward movement of yields on other public utility bonds of comparable quality and Respondents' witness Foster testified that the average yield on Moody's "Aa" bonds during the year 1945 was better evidence of the required yield than the yields on Respondents' own bonds.

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103. As stated hereinabove, Penn Water owns the entire issued capital stock and bonds of Transmission Company.

On the basis of yields to maturity at market price of 30 issues of mortgage bonds of electric and electric-combination utilities offered publicly during the period, April 1, 1945, to March 31, 1946, Respondents' witness Foster determined that 2.78% represented the replacement cost of [135] debt capital, on the basis of a required yield rate of 2.72% and an allowance of 0.6% for the financing spread.[104] He gave consideration to the relationship between the yield rate and, though the margins are generally large, to the prospective coverage of interest requirements, and particular attention to the yield rates of August, September, and October of 1945.

Respondents' preferred stock constitutes an issue relatively small both in amount and in proportion to the total capital structure. Sale prices, and even bid and asked quotations, on a sufficiently continuous and representative basis were not available at the time of the hearing in this proceeding. However, new offerings of electric operating utility preferred stocks in recent years have shown lower average yields to the purchaser.

On the basis of current yields on the preferred stock of 15 electric and electric-combination utility corporations, offered publicly during the period April 1, 1945 to March 31, 1946, Respondents' witness Foster, considering the percent of adjusted gross income required for equal and senior issues, determined that 3.72% represented the replacement cost of preferred stock capital, on the basis of a required yield of 3.60% and a cost of 0.12%.

While the evidence reveals favorable current economic conditions, showing interest rates and yields for corporations generally, and for electric utilities in particular, at low levels, and thus, tends to support witness Foster's 2.78% as the cost of debt capital and 3.72% as the cost [136] of preferred stock, we believe that Foster's results, defer-

104. While the average for "Aa" bonds was 2.70%, on the basis of a comparison with more complete data with respect to yields on outstanding "Aa" bonds he increased the 2.70% by 0.02%. As of March 1947, Penn Water's outstanding bonds of the 1964 and 1970 series were selling above the call price to yield 2.72% and 2.82%, respectively.

mined early in 1946, would not, in view of subsequent market trends, be fair to Respondents. Such trends in the cost of bonds and preferred stock subsequent to his determination indicate that the margin between Penn Water's cost of money and the current cost of money is not so great as to warrant rejection of Penn Water's present cost of bond and preferred stock capital. Accordingly, we find that Respondent Penn Water's cost of bond money for purposes of this rate proceeding is 3.17% and 5.21% for preferred stock.

Respondent, Penn Water, as of December 31, 1946, had outstanding 429,848 shares of no-par common stock with a stated value of $10,868,312.50. This stock has been outstanding over a long period of years and is actively traded.

Respo dent's witness Foster determined the so-called replacement cost of equity capital or common stock to be 9.25%, including 8.5% as the capitalization rate, and 0.75% as a margin for cost of financing. The capitalization rate was obtained by an adjustment of Penn Water's monthly earning-price ratios averaged over a period from August 1939 to December 1945.[105]

[137] Earnings-price ratios on outstanding common stocks of 14 well-known electric operating utilities have declined in recent years, the yields for 1946 being as low as 4.88% (March) with an upward movement in 1947 to 6.89%. The earnings-price ratio for 1,167,397 outstanding shares of Baltimore Company was 4.60% on March 30, 1946, rising

105. There was a sharp increase in the earning-price ratios of Penn Water's common stock subsequent to June 1944, contemporaneous with the initiation of the immediate rate proceeding. The adjustment referred to in the text, *supra*, consisted of a correction for this sharp increase by means of a computation of the average deviation of Penn Water's earning-price ratios from those of the medial four of six selected electric and electric-combination companies, averaged during the preceding period, August 1939 to August 1944. The witness referred to the six companies as representing a homogeneous group of dividend-paying common stocks, the composition of which did not change during the period from 1910 to date, and stated them to be substantially all of such companies that met that qualification. To get an imputed ratio for Respondent he assumed the average deviation could be applied from September 1944 as an addition to the ratios for the medial four. He used the 1939-1944 period as a cycle, though it was one dominated by war conditions.

to 6.84% February 28, 1947. Data with respect to common stocks issued to the public during 1946 showed earnings offering price ratios on an actual earnings basis ranging from 4.58% to 9.56% and on a pro-forma earnings basis from 5.07% to 6.37%. These compare with ratios on earlier issues (1935-1945) ranging from 5.37% to 11.70%. Respondent's witness Foster developed ratios for a group of six electric and electric-combination utilities which included Baltimore Company. These ratios (using the medial four) ranged from 6.7% for a so-called cycle from October 1929 to August 1936, to 7.2% for a so-called cycle from September 1936 to August 1939, to 7.8% for a so-called cycle from September 1939 to January 1946—with an arithmetic mean for the three cycles of 7.2%. Similarly, for a larger group of eleven, which included the six of the previous group, Foster obtained corresponding ratios (medial 5) of 6.3%, 6.7% and 7.1%, respectively. During the same cycles the earnings-price ratios on Penn Water's common stock were 8.0%, 6.9% and 8.5%. During the first nine months of 1946 the earnings-price ratios of the medial four of six varied from a low of 5.44% to a high of 6.25% (September) [138] and of Penn Water from 6.21% to 6.51%.

As of December 31, 1946, and subsequent to the adjustment to surplus which is required in the finding and order herein, Respondents' capitalization consists of 58.19% outstanding debt in the amount of $20,313,000, 6.10% cumulative preferred stock (no par) in the book amount of $2,130,895.50, and 35.71% common stock in the stated amount of $10,868,312.50 with a surplus of $1,598,812.18.

We find, therefore, that a rate of return of 5¼%, applied to the rate base heretofore described ($24,774,712 for 1946) is fair and reasonable. This rate of return which is based upon 3.17% for bonds and 5.21% for preferred stock, allows about 8.64% for common stock and surplus, which is adequate. This return for equity, which takes into consideration cost of floating the stock accords greatest weight to the most recent data and allows for the upward trend in equity investor requirements.

[139] REVENUES AND EXPENSES.

Revenues.

Penn Water's revenues, per books, are classified as follows for the year ended December 31, 1946:

SALES OF ELECTRIC ENERGY	
Sales to other electric utilities	
Consolidated Gas Electric Light and Power Company—	
Net Bill for year	$1,399,331.10
Portion of regulatory expenses and applicable taxes not paid	(294,379.25)
Total	1,104,951.85
Pennsylvania Power & Light Company—	
Lancaster, Pa:	1,944,484.32
Holtwood, Pa.	13,871.33
Total	1,958,355.65
Philadelphia Electric Company—	
Coatesville, Pa.	940,860.95
Edison Light & Power Company—	
York, Pa.	10,331.62
Metropolitan Edison Company—	
York, Pa.	657,123.11
Total sales to other electric utilities	4,679,623.18
Sales to railroads and railways—	
Pennsylvania Railroad Company	1,625,575.45
Total Sales of Electric Energy	6,305,198.63

OTHER ELECTRIC REVENUES:	
Rent from electric property	34.65
Miscellaneous electric revenues—	
Conowingo backwater payment	133,750.00
Other	—
Total	133,750.00
Total Other Electric Revenues	133,784.65
Total Operating Revenues	$6,438,983.28

[140] After adjusting the amount of $1,104,951.85 paid by Baltimore Company by deducting an additional amount of $25,179.56 paid Penn Water as part of the 1946 rate case expenses and adding the increased cost of power purchased from Safe Harbor in the amount of $37,063 for 1946 the adjusted revenue from Baltimore Company becomes $1,116,835.29 and the total revenues become $6,450,832.

Operating Expenses.

Penn Water's operating expenses for the year ended December 31, 1946, per books and as adjusted, are as follows:

	Per Books	As Adjusted
Electric generation—steam	$ 683,567	$ 683,567
Electric generation—hydro	402,895	402,895
Transmission	408,484	408,484
Administrative and general	571,429	571,429
Rate case expenses	319,559	—
Non-operating items	15,293	—
Sub-total Oper. and Maint.	$2,401,227	$2,066,375

Purchased power—Safe Harbor	1,016,501	1,053,564
Interchange power—net	(1,127,699)	(1,127,699)
Depreciation	573,877	467,701
Taxes, except Federal inc.	297,970	264,970
Federal Income tax	892,071	248,513
Total operating expenses	$4,053,947	$2,973,424

The Intervener, Baltimore Company, has petitioned the Commission to determine an allowable amount of rate case expense (with respect to these proceedings) that Respondent, Penn Water, may charge Baltimore Company under the contract between them. It is proper in this proceeding to eliminate from operating expenses and the revenues received from Baltimore Company, the rate case expenses, charged in 1946, as this is a non-recurring item, but Intervener's liability, if any, for such an item relating to past transactions, is a contractual one, which is determinable either under the arbitration procedure provided by the contract, or by proceeding in the courts.

[141] The item of $15,293 represents miscellaneous costs which Penn Water has classified as non-operating and excluded from the power bills to Baltimore Company.

The adjustment of the cost of power purchased from Safe Harbor, an increase of $37,063, has been made to give effect to the rate order of this Commission in the *Safe Harbor* case, supra.[106]

Depreciation expense has been adjusted to conform with the reasonable annual allowance previously discussed and the tax adjustments have been made to reflect the Pennsylvania and Federal income taxes on the basis of a reduction of revenues to yield a fair return of $1,300,672, which is 5.25% of the rate base in the amount of $24,774,712.

106. The Safe Harbor refinancing in 1946 resulted in eliminating income taxes entirely for that year, therefore, the power bill as rendered reflected abnormally low costs.

Excess Revenue.

The excess revenue for the year ended December 31, 1946 is $2,176,736, computed as follows:

Operating Revenues, as adjusted		$6,450,832
Operating Expenses, as adjusted	$2,973,424	
Return at 5.25%	1,300,672	
Deduct		4,274,096
Excess Revenues		$2,176,736

For cost allocation purposes the following reclassifications of revenue and expense items have been made.

[142] Instead of showing the net revenue from interchange power as a credit item to operating expenses, the amount thereof, $1,127,699 has been added to revenues from Baltimore Company. An adjustment of revenue received for special facilities from Pennsylvania Railroad, in the amount of $141,777, in accordance with the allocation of costs of special facilities, has been made by adding the amount to revenues from Baltimore Company and deducting it from revenues from the Pennsylvania Railroad. The item of $133,750 representing the Conowingo backwater payment has been removed from revenues and applied as a reduction of operating costs.

After giving effect to the foregoing adjustments and reclassifications, the gross revenues and cost of service are classified as follows:

Revenues:	
Baltimore Company	$2,386,311
Railroad (in Pa.)	1,483,798
P. P. & L. Co.	1,958,356
Philadelphia Co.	948,861
Metropolitan Co.	667,455
Total Revenues	$7,444,781

Cost of Service:	
Operation and Maintenance	$1,932,625
Purchased power—Safe Harbor	1,053,564
Taxes	513,483
Depreciation	467,701
Return at 5.25%	1,300,672
Cost of Service	$5,268,045

The difference between total revenues and the total cost of service, is therefore, $2,176,736. An allocation of cost has been made to determine the cost of service to each customer and the resulting excess revenue therefrom.

[143] ALLOCATION.

The determination of whether the demand, energy, special facility and other rates and charges paid by those receiving electric power and energy from Penn Water are reasonable is dependent upon the making of a proper allocation of the costs of service between these customers and a comparison of the costs so allocated to each customer with the revenues obtained from the customer.

Respondents contend that the allocation of costs to, and revenues from, Penn Water's Pennsylvania customers, should follow jurisdictional lines, and asserts that a comparison of costs and revenues as to Baltimore Company alone indicates that charges to the latter are actually deficient. The question of jurisdiction of the Commission with respect to the Pennsylvania rates and charges has, however, already been determined herein.

Disagreement as to Division of Cost of Service between Baltomore Company and Pennsylvania Customers.

Staff's witness Davis allocated the total cost of service for capacity, firm energy and special facilities supplied by Respondents. The allocation resulted in charging 96.5% of Respondents' cost of service to Pennsylvania customers and 3.5% to that rendered Baltimore Company, after crediting

the latter with an amount of firm energy and capacity supplied by it for use by Penn Water in serving the latter's customers in Pennsylvania. On the other hand, Respondents' witness Zinder, using a return of 6½% and other bases consistent with Respondents' contentions herein, allocated 41.4% of his total cost of service for 1946 to Baltimore Company.

[144] Respondents' witness Loane, using Davis' method for "illustrative purposes", and making several adjustments to the latter's exhibit, with respect to the credit for Baltimore Company's energy diverted at Safe Harbor and with respect to dependable capacity delivered to Baltimore Company at Highlandtown and capacity diverted by Penn Water at Safe Harbor, allocated 20.6% of the total cost of service to Baltimore Company, and 79.4% to the Pennsylvania customers. Baltimore Company's witness Gibbs, by contrast, submitted results of his revisions to Davis' exhibit, to show, according to that intervener's contentions, that the Pennsylvania customers were not fully paying for the cost of the service rendered but were, in effect, being subsidized by Baltimore Company by an amount of approximately 6.4% of total costs.

By combining recomputed firm power services rendered Baltimore Company by both Penn Water and Safe Harbor, Respondents' witness Spaulding testified that costs applicable to such services exceeded the recomputed billing by the amount of $266,578. Important bases for Spaulding's determination were the assumptions that Safe Harbor and Penn Water render joint services to Baltimore Company, and that Baltimore Company does not have a right or contract entitlement to two-thirds of Safe Harbor's output.

Methods Employed in Analyses of Costs.

Each of the several witnesses first analyzed costs on the basis of the allocation of investment both for special services to specific customers and for general services to all. With respect to special facility service each proceeded to

use a rate base and return [145] method for getting one element of cost,[107] the method of treating depreciation varying according to the contentions of the parties.[108] Davis included Penn Water's cost of purchased power as a part of operating expense to be allocated, but Respondent's witness Spaulding considered the capacity and output of the Penn Water-Safe Harbor plants on a system basis, without regard to Baltimore Company's entitlements under its contracts with Penn Water and Safe Harbor.[109]

The witness Davis based a part of his exhibit upon the pooling of investment or costs for all those facilities which he found were used in rendering a service common to all and not specifically applicable to any one customer, and upon a final allocation thereof according to capacity or energy use by each customer. The witness Spaulding employed a similar principle in [146] making his allocation to Baltimore Company using an undepreciated production plant rate base, and associated expenses, computed separately for Penn Water and Safe Harbor. The witness Zinder's exhibit reflected joint use of property to a very minor degree.

Neither Spaulding nor Zinder made any determination as to cost of service for any other customer than Baltimore Company.

Allocation of Transmission Facilities.

With respect to these facilities, the allocation of three groups are in issue:

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107. The rate base, the allowance for working capital and the rates of return varied; Davis using a 5% rate of return, Spaulding 6½% for Penn Water, and 7% for Safe Harbor.

108. Respondents' witness Loane followed Davis' method of deducting the depreciation reserve, confining his adjustments to the latter's exhibit, to other matters. Davis used an allocation of the reserve which was based on the application of depreciation rates to property groups included in the facilities Davis had already allocated in his Table 1. Spaulding allocated the reserve simply in the ratio of investment (which reserve was not deducted from the rate base but used to obtain a credit to consumers to deduct from return). Zinder allocated the reserve also in direct ratio to investment.

109. Davis allocated depreciation expense between customers on the same basis as depreciable property, income taxes and capital stock taxes by investment ratio, property taxes on the same basis as property, unemployment insurance on the basis of operating expense, and gross receipts tax on the basis of gross revenues.

(d) 220 Kv. 60 Cycle Lines and Switching Stations.

The witness Spaulding allocated the costs associated with these facilities 100% to Baltimore Company, the witness Zinder 85% (except for the Ellicott City-Takoma Park line),[110] and Staff's witness Davis 66 2/3%, which last allocation was concurred in by Baltimore Company's witness Thomas.[111]

The allocation of the witness Spaulding is based upon his view that the transmission of energy from Baltimore to Pennsylvania does not relate to the firm demand requirements of any of the [147] Pennsylvania customers except the Railroad and that the supply to the Railroad is in part a responsibility of Baltimore Company.[112] But it should be observed that the river-run characteristics of Penn Water's hydro plant (and Safe Harbor's) makes it impracticable for Penn Water to serve the firm requirements of the Pennsylvania customers without the availability of the substantial amounts of off-peak energy which it obtains from Baltimore Company. Moreover, the contracts with Pennsylvania customers, providing for economy interchange, are obviously neither designed nor adequate for "firming up" Penn Water hydro for services to the Pennsylvania customers. The very use of the term "economy" in the contracts describing this type of interchange is demonstrative of such inadequacy.

The witness Zinder's allocation of 85% of the cost associated with these facilities to Baltimore Company is a judgment determination based in part upon his computation that, over a five-year period (1941-1945), approximately 81% of the energy flow over these same facilities repre-

110. Allocated 100% to Baltimore Company.

111. As the witness Davis allocated 33-1/3% of these transmission facilities to pool, and his method calls for further allocation of transmission costs to customers from this pool by way of capacity assignments, Baltimore Company would be further charged with an additional portion of these facilities and their costs, depending upon whether it receives capacity from Penn Water.

112. He considers the problem as if Baltimore Company's entitlement to power and energy from Safe Harbor did not exist. This interpretation of the subordination of entitlement is neither necessary nor supportable.

sented deliveries to Baltimore Company. This computation, coupled with his division of all costs into equal demand and energy components, amounts, in effect, to an allocation of 90% of the capacity cost to Baltimore Company.[113] Zinder's allocation does not [148] properly reflect the necessary use of these lines by Penn Water in meeting the firm requirements of the Pennsylvania customers.

Davis, on the other hand, assigned these facilities and their associated costs 66 2/3rd directly to Baltimore Company, giving consideration to the directional dominance of energy flows over the circuits by periods of the year, when, during four or five months of high river flow the great bulk of energy is being transmitted to Baltimore; during two or three months of extreme low river flow the great bulk of energy is being transmitted from Baltimore, to make up the deficiency in Penn Water's firm supply for its Pennsylvania customers; and during the remaining four to six months the facilities are used to transmit energy alternately in either direction, with Penn Water receiving energy from Baltimore Company during off-peak periods of the day, to enable it to store water at such times.[114]

Giving due consideration to the character of services provided to Baltimore Company and to the Pennsylvania customers by the use of these lines, and bearing in mind that Baltimore Company will also share pool costs as to these same facilities in proportion to the capacity service rendered it, Davis' allocation of 66 2/3rd directly to Baltimore Company, and 33 1/3 to the pool, is found to be reasonable.

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113. Accordingly, his judgment of an over-all allocation of 85% of all costs to Baltimore Company is obtained first and the other figures constitute little more than a sequent.

114. His judgment was based on the 1943, 1944 water years, the latter a low-flow year; 1943 was nearer the average but affected by northern requirements for war production purposes. However, this factor alone does not require a specific modification of the proposed allocation. Observe that Intervener's witness Thomas testified that Davis' allocation was supported on the basis of the maximum one-hour supply in each direction in 1944.

[149] (b) *Safe Harbor-Perryville Line, Conestoga Substation and Perryville Switching Station.*

The witness Spaulding considered these 25 cycle, single phase facilities as special facilities for Railroad use in Pennsylvania and Maryland and, on an energy basis, allocated 52.8% of the cost of such facilities to Baltimore Company for services rendered to the Railroad in Maryland, less charges paid PEPCO by Baltimore Company for the use of a frequency-changer at Benning.

The witness Zinder allocated none of the costs associated with these facilities to Baltimore Company, on the ground that he confined his study to services rendered by Penn Water to Baltimore Company alone.

On the other hand, Staff witness Davis allocated the substation 47% to Baltimore Company and 53% to the Railroad in Pennsylvania, and the line and switching station 91% to Baltimore Company and 9% to the Railroad in Pennsylvania, in each instance on the basis of energy flows over the facilities and on the ground that these facilities were used not only for service to the Railroad in Pennsylvania and Maryland, but also for the rendering of interchange services to Philadelphia Company on the behalf of Baltimore Company from the residual of energy to which the latter is entitled under its contract.[115]

[150] Obviously, Spaulding's basis of allocation does not reflect the complete use to which these facilities are put.

The procedure employed by the witness Davis gives weight to the use of such facilities for interchange with Philadelphia Company, and the evidence supports his conclusion as to the ratio of the allocation.

(c) *Holtwood-York Line and Violet Hill Substation.*

Neither the witness Spaulding nor the witness Zinder made any allocation with respect to these facilities. The

115. In its Form 1 reports for 1944 and 1945, Penn Water reported that in the actual accounting for interchange tranasactions by Respondent with Philadelphia Company at Coatesville, Pennsylvania Power & Light at Lancaster, and Edison Light & Power Company at York, such energy was considered to have come from Maryland. With respect to Philadelphia Company, no other interchanges were shown.

witness Davis allocated associated costs 55% to Metropolitan Company and 45% to Baltimore Company, on the basis of the ratio of interchange energy to total energy delivered during the year. The allocation of this line and substation is approved as made by Davis, as proper recognition has been given by him to their use for interchange.

Special Facility Costs.

Based upon the foregoing conclusions and other allocations not contested except on broad general jurisdictional grounds [116] the following allocated special facility costs are obtained for each [151] customer: [117]

	Operating Expense	Bill for Safe Harbor Power	Taxes	Depreciation	Return	Total
P. P. & L.	$ 1,382	$——	$ 7,548	$ 766	$ 1,877	$ 11,573
Philadelphia Company	27,843	——	11,086	6,704	26,095	71,728
Metropolitan Company	14,772	——	7,479	4,744	15,811	42,806
Railroad	24,165	24,581	14,873	13,925	31,810	109,354
Baltimore Company	367,398	21,798	143,096	79,300	305,951	917,543
Total	$435,560	$46,379	$184,082	$105,439	$381,544	$1,153,004

Allocation of 25 Cycle Production Facilities to Pool.

The witness Spaulding, in effect, allocated these facilities on a capacity and energy basis 50.15% to Baltimore

116. There are no issues here raised with respect to Davis' allocation of the Holtwood-Highlandtown 66 kv line, the Highlandtown Substation, and the so-called Gunpowder Line (in the Baltimore area) 100% to Baltimore Company; the Holtwood-Coatesville line and the Newlinsville Substation (Coatesville) to Philadelphia Company; the 25-cycle Holtwood-Lancaster line, and 5 switching and substations to PP&L; the Fishing Creek Substation to the Railroad in Pennsylvania; and the rest of the transmission system, including the 60-cycle Safe Harbor-Holtwood line, to pool. The jurisdictional grounds have already been considered herein.

117. Davis allocated administrative or general expense to the pool. However, it appears from the evidence that because of the nature of the elements constituting administrative and general expense, a modification should be made with respect to this expense. Accordingly, it has been allocated in a manner consistent with the allocation of the other operating expenses, i. e. in the ratio of a facility investment totalling $33,126,585 after net allowances herein of $187,165.

Company and Respondents' witness Zinder 92% to that Company, substantially on an energy basis.[118]

Spaulding's 50.15% determination involves acceptance of his estimate of dependable hydro capacity and also his combining the dependable capacity for both Penn Water and Safe Harbor without regard to the Baltimore Company's entitlement (contract proportion) in [152] determining the capacity service rendered Baltimore Company. Zinder's 92% allocation to Baltimore Company assumes that all, or substantially all, of the capacity and energy delivered by such facilities are used by Baltimore Company at Baltimore and not in conjunction with the system's coordinated operations. However, intervener Baltimore Company's witness Thomas, an operating executive, testified that at times a part of the 25 cycle energy delivered at Highland town is converted through the frequency changers of Baltimore Company in Baltimore, Maryland, to 60 cycle energy either to transmit for use in Pennsylvania or to retain and substitute for energy at Baltimore thus either freeing 60 cycle Baltimore energy for transmission to Safe Harbor or some of Baltimore Company's entitlement at Safe Harbor for use in Pennsylvania.

On the basis of the foregoing testimony of the witness Thomas, and the evidence contained in the record in this proceeding in support thereof, Davis' allocation of these facilities entirely to the pool requires an adjustment.

In charging Pennsylvania customers equitably for energy received, it becomes necessary and proper to first charge Baltimore Company with all of the hydro capacity and energy received and to credit it for all steam capacity and energy supplied by it and all hydro capacity and energy diverted from it. Accordingly, on this basis, there should be charged to Baltimore Company the net Holtwood dependable hydro capacity (84,480 kw), less the Holtwood

118. No classification into demand and energy components was made by Zinder and no account was taken of the net conversion of 25 cycle to 60 cycle energy for the year, as he testified it would have made only an insignificant difference.

60 cycle hydro rating (24,000 kw), the Holtwood 25 cycle capacity supplies PP&L (5,000 kw) at Lancaster, Pennsylvania, and the capability [153] of the two 25-60 cycle frequency changers (14,000 kw) at Holtwood.

Allocation of Pool Costs.

The allocation of costs associated with pool facilities (facilities other than those already allocated to specific customers) involves the utilization of a determination of the dependable capacity available to Penn Water from its own resources and its entitlement with respect to Safe Harbor's resources.

Using a dependable hydro capacity for both Penn Water and Safe Harbor of 295,000 kw, Spaulding allocated a part of general production plant [119] to Baltimore Company on the basis of capacity and energy delivered to the latter after proportioning the dependable capacity and energy components in a 50-50 ratio,[120] because such a proportion gave results in dollars per kw and mills per kwh that appeared to him reasonable on a "competitive basis". Spaulding's 50-50 division of costs between capacity and energy is thus patently a departure from cost determination procedure.

[154] Davis allocated Penn Water's hydro and steam production plants, one-third of the 220 kv, 60 cycle lines and switching stations, a part of the transmission system referred to by him as "balance of transmission system" (including the Safe Harbor-Holtwood 66 kv circuits), intangible plant, and general plant to pool. He allocated production costs, including a part of the Safe Harbor bill, transmission operating expense associated with the foregoing allocation of transmission property to pool, all of ad-

119. Including Penn Water's hydro station, steam station, coal production and preparation plants, service buildings, step-up substations, certain tie circuits, dispatching facilities and the operators' village as well as similar Safe Harbor facilities.

120. He determined Baltimore should be charged with 54.0% of the costs of firm energy and 46.3% of those of capacity, and applied each of these ratios to 50% of the costs associated with the general production plant of Penn Water and Safe Harbor, separately.

ministrative and general expenses, a portion of taxes, depreciation expense and return as pool costs. Using a total dependable capacity of 250,000 kw, as compared with Spaulding's 295,000 kw, Davis then proceeded to develop (1) a total capacity cost by assigning 74.85% [121] of hydro power production cost (including a large part of the power purchased from Safe Harbor) as dependable hydro capacity cost, adding a computation of fixed steam costs, and all of pool transmission cost; and (2) a total energy cost by assigning 25.15% of such hydro power cost as a cost of energy and adding the variable steam cost.[122]

[155] *Dependable Hydro Capacity.*

The most important element in Spaulding's determination of capacity available for supply to Baltimore Company was the determination by Respondent's witness Watchorn of 295,000 kw as the dependable hydro capacity of the Holtwood and Safe Harbor plants. The latter employed a method involving an application of the theory of probability to several different factors bearing on dependability of service. This method of determining dependable capacity was not used by Penn Water in its operations prior to 1944 and is not only highly speculative but is of unproven reliability from an operating standpoint.

Davis' figures of 250,000 kw is based upon an estimate of basic load carrying capability of 167,000 kw increased by a judgment allowance for additional probable capacity totalling 83,000 kw. Davis' basic load-carrying capability represents (1) the use of the minimum recorded river flow for seven consecutive days in December, converted into a week's equivalent generation at both Safe Harbor and Holtwood;

121. Davis' determination of 74.85% as the proportion of production cost to be allocated to capacity is the ratio of total dependable hydro capacity to the total effective installed capacity of both Penn Water and Safe Harbor.

122. Davis obtained unit capacity costs by dividing the total capacity cost of dependable hydro, fixed steam and transmission costs by the Pennsylvania customers total non-coincident demands; and he obtained unit energy costs by dividing total energy cost by Penn Water's total steam and hydro energy resources (including Penn Water's entitlement from Safe Harbor) less certain transmission losses.

(2) the fitting of the total generation thus computed without regard to plant priority [123] in the top of the curve for the 1946 week peak load on the Baltimore-Washington-Holtwood-Safe Harbor system,[124] and (3) finding the maximum reduction [156] in peak that could be accomplished by both hydro plants under the assumed condition of river flow. This reduction in peak amounts to an ability to carry a load of 167,000 kw throughout the week on the basis of no loss of pondage except during the middle of the week.

Respondents object to Davis' determination on the ground that adverse flow conditions occur infrequently and the use of such conditions, as the basis for determining dependable capacity, does not adequately allow for the actual use that can be made of the installed capacity of the plants; that it overlooks the full effect of coordination of steam maintenance with river flows as well as capacity available for spinning reserve; and gives insufficient effect to the fact that during a large part of the year there is actually being utilized on the interconnected system capacity in excess of 300,000 kw.

As to criticism directed by Respondents to the limited amount allowed by Davis (28,000 kw) for pond drawdown for short-time peak loads, it may be said that the Safe Harbor and Holtwood hydro plants operate on a weekly recovery cycle which calls for pond refill over the weekends by every Monday morning. A larger allowance for drawdown than that provided by Davis would not only fail to fit into that program but the departure therefrom during a period of low flow would undoubtedly adversely affect the sustained peak-carrying hydro capacity of the plants. The allowance provided by Davis for drawdown, which is approximately 50% of that claimed [157] by Respondents for the same purpose, was supported by Balti-

123. Putting Holtwood hydro alone at the top of the curve would result in a dependable capacity for that plant approximately equal to its installed capacity

124. December 15-22. He adjusted the load curve by diminishing load requirements by the amount of capacity Metropolitan Edison would forfeit under minimum-flow conditions.

more Company's expert witness Thomas as reasonable from an operating standpoint. Davis makes further provision for additional capacity use in the amount of 55,000 kw. This is an adequate allowance for such intangibles as might inhere in additional use for scheduling of maintenance, short-time emergencies, load swings, expectation of flows better than minimum, etc. In this respect, Davis' determination of over-all dependable capacity (250,000 kw), though more liberal than the 237,000 kw testified to by Baltimore Company's witness, is better supported in the evidence than the latter figure.

It is therefore found that Davis' determination of dependable capacity is reasonable and acceptable for the purposes of this proceeding and that the determination of the witness Watchorn is not sufficiently supported by established or tested procedures to be reliable and here acceptable.

[158] Davis, however, prorated his finding of dependable capacity for both the Holtwood and Safe Harbor hydro plants (250,000 kw) between those plants in the ratio of the installed capacity at each development. Respondents contend that dependable capacity at Holtwood is not related to the proportion of installed capacity at those plants as the hydraulic head and available water at each is approximately the same.

In view of the large amount of idle machine capacity which the evidence shows would be available at each hydro plant during minimum flow conditions, Respondents' contention has merit and a modification should be made in the proration used by Davis. In consideration of the foregoing, and on the basis of the evidence, it is found that it is proper to prorate the 167,000 kw of dependable hydro capacity between the two hydro plants equally, provided weight be given to the fact that the over-all water use at the two plants varies at equivalent station loads. On the basis of water use at approximately 75% station load and water conditions used by the witness Davis, a week's gen-

eration under minimum flow conditions is computed to consist of 1,699,855 kwh produced by Holtwood and 1,861,745 kwh by Safe Harbor. The dependable capacity between the two plants should be prorated on the basis of this computed production of energy, thus assigning 79,705 kw of the 167,000 kw dependable capacity to Holtwood (Penn Water) and 87,295 kw to Safe Harbor.

[159] The remaining 83,000 kw entering into the 250,000 kw [125] found to be the combined total dependable capacity for the two hydro plants, because of the nature of the intangibles upon which it is based, should be prorated between the plants in the ratio of installed capacity at each plant in excess of the allocation of the 167,000 kw.

These adjustments to Davis' method will allocate a total dependable hydro capacity of 91,740 kw to Holtwood and 158,260 kw to Safe Harbor, before deduction for station uses and line losses, as follows:

Davis' Allocation	*Holtwood*	*Safe Harbor*	*Total*
Installed hydro:			
Effective reported	104,000 kw	230,000 kw	334,000 kw
Per cent of total	31.14%	68.86%	100.00%
Davis Allocation of Total Dependable Hydro Capacity (31.14% and 68.86%)	77,844 kw	172,156 kw	250,000 kw
Modified Allocation			
Allocation of Davis' 167,000 kw on basis of low water energy	79,705 kw	87,295 kw	167,000 kw
Excess of installed over minimum flow capacity	24,295	142,705	167,000

125. 167,000 kw basic dependable capacity with a minimum flow for 7 consecutive days in December, plus the 83,000 kw allowance for drawdown and intangible factors.

Per cent of excess to total of 167,000 kw	14.5%	85.5%	100.00%
Allocation of Davis' 83,000 kw allowance for pondage and intangibles (14.5% and 85.5%)	12,035 kw	70,965 kw	83,000 kw
Total dependable hydro capacity as reallocated	91,740 kw	158,260 kw	250,000 kw

[160] *Capacity Available to Baltimore Company.*

The resulting capacity available to Baltimore Company depends on the deductions to be made for Pennsylvania customer loads, including the Railroad's in Pennsylvania. Spaulding deducted from his figure of capacity available at the time of the combined system peak (305,000 kw) 134,000 kw for the Pennsylvania customer loads (including the Railroad's in Pennsylvania) and 20,000 kw as the share of combined system reserve to be carried by Penn Water and Safe Harbor, or a total of 154,000 kw. Davis deducted from his net dependable capacity available for load, a corresponding sum of 153,512 kw. While the two deductions are in practically the same amounts, Respondents object principally to the method used by the witness Davis in determining the demand to be deducted for the Railroad as representative of its Pennsylvania requirements. Davis did not use the actual Railroad requirement at the time of system peak (6 p. m., December 19, 1946) of 24,000 kw, but a resulting figure obtained after averaging the three maximum Railroad peaks in the month of December. The Railroad's load has an uneven fluctuating character and the very contract under which it is billed for demand provides a similar method of calculating that demand. It cannot be seriously contested that an averaging procedure is called for, and it is found that the one used by the witness Davis

has precedent and is fair, both as to the determination of the demand and as to the allocation of a portion [161] of such demand to Pennsylvania on the basis of energy used. Objection by Respondents to Davis' allowance of any amount as reserve for Metropolitan Company is without merit as the nature of the Metropolitan Company's contract in respect to reserve provision is no different from those of the other customers involved.

Davis' allowance of only 10% for reserve capacity is criticized both by Respondents, whose witness Spaulding used 15%, and by Baltimore Company, whose witness Gibbs used 22.5%. In view, however, of the adverse flow conditions assumed, with resulting idle machine capacity, the use of 10% for additional system reserve is an adequate allowance. The 22.5% proposed by the Intervener is not representative of a true operating reserve.

The balance available to Baltimore Company after deducting station use and transmission losses, the demands of Pennsylvania customers on system peak, and Baltimore Company's two-thirds entitlement from Safe Harbor was found by Davis to be a negative 3,200 kw. With the modifications found necessary, above, with respect to the method of treating the allocation of the costs associated with the 25-cycle production facilities and the method of allocating the dependable capacity between the two plants, the capacity considered as supplied to and by Baltimore Company is as follows:

[162]

	Holtwood		Safe Harbor	
	Steam (kw)	Hydro (kw)	Hydro (kw)	Total (kw)
Dependable capacity	28,000	91,740	158,260	278,000
Less prorated station use and line losses	2,216	7,260	12,524	22,000
	25,784	84,480	145,736	256,000

Less Baltimore Co.'s 2/3rds of Safe Harbor's capacity			97,157	97,157
Less 25 cycle to Highlandtown [126]		41,480		41,480
	25,784	43,000	48,579	117,363
Demands in Pennsylvania [127]				153,512
Balance to be supplied by Baltimore Company				36,149

Unit Costs for Capacity and Firm Energy and Further Allocations.

Allocating hydro production costs to capacity in the ratio of dependable to installed hydro capacity (250,000 kw to 334,000 kw), i. e., 74.85%, adding fixed steam production costs, and pool transmission costs, a sum of $2,882,478 is obtained as the total of pool capacity costs. Similarly, the addition of the remainder of the hydro production costs (25.15%) and variable steam production costs produces a sum of $1,232,563 as the total of pool energy costs. The foregoing total capacity cost ($2,882,478) divided by the Pennsylvania customers' maximum non-coincident demands [128] (154,000 kw) plus the net dependable [163]

126. Dependable 25 and 60 cycle capacity at Holtwood (net); 84,480 kw
Capability two Holtwood frequency converters 14,000 kw
Holtwood 60 cycle rated capacity 24,000
PP&L (Lancaster) 25 cycle load 5,000 43,000
41,480 kw

127. Coincident demands of Pennsylvania customers plus allowance for reserve:

P. P. & L.	55,000 kw
P. E. Co.	27,000 kw
Me. [ME] Co.	21,000 kw
Penna. R. R.	36,557 kw
10% Reserve	13,955 kw
Total	153,512 kw

128. To allow for mutual diversity of load benefits.

capacity available for Baltimore Company (5,331 kw) yields a unit capacity cost of approximately $18.09 per kw. This cost applied to an aliquot [129] of the maximum demands of the several Pennsylvania customers on a non-coincident basis and to the 41,480 kw of capacity found proper for allocation to Baltimore Company (*supra*) results in an allocation of the cost of pool capacity as a constituent of total capacity cost as follows:

	Pool Capacity Cost [129]	Baltimore Co. Supply Capacity Cost [130]	Total Capacity Cost
P. P. & L. Co.	$ 927,587	$188,724	$1,116,311
Philadelphia Co.	359,959	73,236	433,195
Metropolitan Co.	318,422	64,788	383,210
Railroad (in Pa.)	526,090	107,040	633,130
Baltimore Co.	750,420	(433,788)	316,632
Total	$2,882,478	—	$2,882,478

Holtwood unit energy costs are obtained by dividing the total energy cost ($1,232,563) by the delivery by Penn Water from its Holtwood hydro and steam plant and from its 1/3rd entitlement to Safe Harbor's output, which for 1946 totaled 992,320 mwh. The resulting Holtwood energy cost is 1.24 mills per kwh. 1946 sales of energy to Pennsylvania customers totaled 937,950 mwh of which 746,286 mwh was sold as firm and 191,664 mwh as net interchange. Of this 937,950 mwh supplied, Penn Water had available 615,636 mwh (992,320 mwh less deliveries of 25 cycle energy to Baltimore Company at Highlandtown) and the remainder required (322,314 mwh) [164] was obtained from Baltimore Company. It is not possible to trace the flow of energy from Baltimore Company to the Pennsylvania customers at all times or to distinguish the use to which such energy is put as between sales of firm and interchange

129. Assuming the Pennsylvania maximum demands are each met by Penn Water's capacity and Baltimore Company's supply in the ratio of 117,851 kw and 36,149 kw to the total of 154,400 kw.

130. Computed at $12 per kw.

energy. For this reason a proration procedure is necessary and, accordingly, using the ratio of Baltimore Company's contribution of 322,314 mwh (34.4%) and Penn Water's of 615,636 mwh (65.6%) to the total of their combined contributions, it is found that Penn Water delivered from its resources 489,835 mwh for firm sales (including the Railroad in Pennsylvania) and 125,801 mwh for interchange sales to Pennsylvania customers and Baltimore Company delivered 256,451 mwh for firm sales and 65,863 mwh for interchange in Pennsylvania. As interchange sales in Pennsylvania are on a when-as-and-if basis, the mwh so supplied by Penn Water comes from Baltimore Company's contract residual entitlement to Penn Water's resources and are therefore deemed to have been made for Baltimore Company's account. On this basis, Baltimore Company received a total of 502,485 mwh at the Holtwood energy cost, made up of deliveries to it at Highlandtown (376,684 mwh) and the amount sold by Penn Water from its own resources as interchange (125,801 mwh). Accordingly, the Pennsylvania customers are deemed to have received 489,835 mwh of firm energy at Holtwood energy cost (1.24 mills/kwh), and 256,451 mwh of firm energy at Baltimore Company's average steam production [165] cost (4.7 mills/kwh), while Baltimore Company is to be credited with the cost to it of supplying such firm energy against the charge made to it for the 502,485 mwh at the Holtwood energy cost. The allocation of these pool energy costs are as follows:

	Firm Energy Supplied			Firm Energy Cost		
TO:	From Holtwood (mwh)	From Baltimore (mwh)	Total (mwh)	From Holtwood ($)	From Baltimore ($)	Total ($)
PP&L	202,533	105,036	308,569	251,567	498,367	749,934
Philadelphia Co.	89,022	46,607	135,629	110,574	219,053	329,627
Metropolitan Co.	58,158	30,448	88,606	72,238	143,107	215,345
Railroad (in Pa.)	140,122	73,360	213,482	174,046	344,793	518,839
Sub-total	489,835	256,451	746,286	608,425	1,205,320	1,813,745
Baltimore Co.	502,485	(256,451)	246,034	624,138	(1,205,320)	(581,182)
Total	992,320	—	992,320	$1,232,563	—	$1,232,563

The amount of residual hydro energy delivered to Baltimore Company by Respondents in 1946 (502,485 kwh) at the Holtwood energy cost (1.24 mills) combines with the firm energy supplied by Baltimore Company (256,451 mwh) in 1946 for the use of Penn Water's Pennsylvania customers to give a net credit to Baltimore Company, for firm energy supplied by it against residual energy received, in the amount of $581,182.

Total Costs, Excess Revenues.

The allocated special facility costs added to the allocated hydro capacity cost and the allocated cost of capacity supplied by Baltimore Company (supra) and to firm energy costs give total allocated costs which compare with total revenues as follows:

[166]

	Total Costs	Total Revenues	Excess Revenues Amount	Percent
PP&L Co.	$1,877,818	$1,958,356	$ 80,538	3.70
Philadelphia Company	834,550	948,861	114,311	5.25
Metropolitan Company	641,361	667,455	26,094	1.20
Railroad (in Pa.)	1,261,323	1,483,798	222,475	10.22
Baltimore Company	652,993 [131]	2,386,311	1,733,318	79.63
Total	$5,268,045	$7,444,781	$2,176,736	100.00

RATE REDUCTION

The above determination of excess revenues demonstrates that Penn Water's rates are excessive, unreasonable and discriminatory. It is accordingly found that Respondent shall revise its rates and charges so as to result in a reduction of $80,538 to P. P. & L. Co., $114,311 to Phila-

131. This cost to Baltimore Company is made up of the charge of $750,420 for hydro capacity of 41,480 kw supplied to it plus a cost of special facilities of $917,543; less the credit to Baltimore Company of $433,788 for 36,149 kw of capacity supplied by it and the net credit of $581,182 for firm energy supplied.

delphia Co., and $26,094 to Metropolitan Company when applied to the demand energy and other charges made during the year ended December 31, 1946. As previously noted (*supra*, note 2 p. 22), we have confined our inquiry to Penn Water's sales to its resale customers. We determine, however, that Penn Water's cost of the service it rendered in 1946 under the contract for the sale to the Railroad was $222,475 less than the revenues it received therefor.

Under the arrangements now in effect the sales to Pennsylvania Power & Light Company, Philadelphia Electric Company and Metropolitan Edison Company are made on a firm basis and Baltimore Company takes what is left. In fact, Baltimore Company in times of severe water shortage may carry the main burden of supplying the foregoing Pennsylvania customers.

[167] It is not feasible, because of the nature of Penn Water's operations, for the latter to assume firm commitments to all its customers, including Baltimore Company. The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. That arrangement will, therefore, be continued with, however, such modifications as are necessary to accomplish the reductions mentioned above to Pennsylvania Power & Light, Philadelphia Company, Metropolitan Company and Baltimore Company.

Penn Water's rates and charges to Baltimore Company will be just and reasonable when the power bill is computed by the use of the fair rate of return and the rate base we have found, brought down to date every six months for changes in the plant investment, depreciation reserve and working capital. In computing the power bill to Baltimore Company there shall be added to the fair return all reasonable and necessary operating expenses, taxes and deprecia-

tion computed on the plant investment and at the depreciation rates we have herein found proper; there shall be deducted from such total electric revenues received from others, including the Conowingo backwater payment, and the gross revenues from Metropolitan Co., P. P. & L. Co., and Philadelphia Co., and the gross revenues, except the excess revenues, calculated at $222,475 for the year 1946, and income taxes associated therewith, from Pennsylvania Railroad.

[168] Our specific findings of fact and order will be entered in accordance with this opinion.

Sgd. NELSON LEE SMITH,
Nelson Lee Smith,
Chairman

Sgd. THOMAS C. BUCHANAN,
Thomas C. Buchanan,
Commissioner

Sgd. LELAND OLDS,
Leland Olds,
Commissioner

I concur in the result only.

Sgd. CLAUDE L. DRAPER,
Claude L. Draper,
Commissioner

Dated at Washington, D. C., this 4th day of January, 1949.

Sgd. LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman, Thomas C. Buchanan, Claude L. Draper and Leland Olds.

January 4, 1949

In the Matter of
PENNSYLVANIA WATER & POWER COMPANY } Docket No. IT-5915

ORDER REDUCING RATES.

Upon consideration of the record in the above-entitled proceeding and the arguments adduced, and having this day issued its Opinion No. 173 in this matter, which hereby is incorporated by reference and made a part hereof—

The Commission further *finds* that:

(1) Penn Water (successor through reorganization under the laws of Pennsylvania, on January 13, 1910, of McCall Ferry Power Company which had been formed by the merger, on April 14, 1905, of [The] Hillside Water & Power Company and Susquehanna Water & Power Company) owns, operates and maintains hydroelectric and steam-electric generating facilities, all located on the Susquehanna River at Holtwood, Pennsylvania, about eight miles below the hydroelectric project of Safe Harbor, about nine miles north of the Pennsylvania-Maryland boundary line, and about 61 miles northeast of the City of Baltimore. Penn Water's hydro plant, comprising 10 main generating units (eight, 25-cycle, and two, 60-cycle), has an effective capacity of 104,000 kw; its steam plant, comprising two 60-cycle generating units, has an effective capacity of 26,000 kw. There are also two 5,000 kw, 25/60 cycle frequency changers.

(2) Safe Harbor Water Power Corporation (Safe Harbor) owns, operates and maintains a hydroelectric plant and certain appurtenant transmission facilities, all located in Pennsylvania on the Susquehanna River about 17 miles north of the Pennsylvania-Maryland boundary line. Safe Harbor's hydro plant, comprising seven main generating units (five, 60-cycle and two, 25-cycle) has an effective capacity of 230,000 kw. Safe Harbor owns, operates, and maintains the afore-described hydroelectric power project under a license for Project No. 1025, first issued April 22, 1930, by this Commission, pursuant to the Federal Power Act, which, as amended, is now Part I of the Federal Power Act (Act).

(3) Consolidated Gas Electric Light and Power Company of Baltimore (Baltimore Company) owns, operates and maintains, among other facilities, steam-electric generating facilities located in and near Baltimore, Maryland. Such facilities include four plants, comprising sixteen generating units (eight, 60-cycle, and eight, 25-cycle), having a total effective capacity of 479,000 kw.

(4) Susquehanna Transmission Company of Maryland (Transmission Company) is a wholly-owned subsidiary of Penn Water, engaged only in the transmission of electric energy in Maryland for Penn Water, Safe Harbor and Baltimore Company. Of the transmission facilities referred to in (5) below, those located in Maryland are owned and operated by Transmission Company.

(5) Penn Water owns and operates transmission facilities in Pennsylvania which have been constructed and are operated and maintained in combination with those of Trasmission Company in Maryland to form a transmission network, including: two 220 kv, 60-cycle, three-phase, single, transmission circuits extending from Safe Harbor to points of connection with Baltimore Company near its Westport and Riverside steam-electric plants in Maryland, and to a point of connection with Potomac Electric Power Company

(PEPCO) near Takoma Park, Maryland; four 132 kv, 25-cycle, single-phase, transmission circuits extending from the Conestoga Substation, near the Safe Harbor hydro plant, to a point of connection with facilities of the Pennsylvania Railroad (Railroad) at Perryville, Maryland; two 66 kv, 60-cycle, three-phase, transmission circuits between the Safe Harbor and Penn Water plants, which are tapped by lines owned and operated by Pennsylvania Power & Light Company (PP&L) extending from the Lehman Farm Substation to Lancaster, Pennsylvania, and from the Donegal tap to Harrisburg, Pennsylvania; two 66 kv, 60-cycle, three-phase, transmission circuits extending from the Holtwood Substation to a point of connection with Metropolitan Edison Company (Metropolitan Company) at York, Pennsylvania; two 66 kv, 60-cycle, three-phase, transmission circuits extending from the Holtwood Substation to a point of connection with Philadelphia Electric Company (Philadelphia Company) at Coatesville, Pennsylvania; two 66 kv, three-phase, transmission circuits (one, 60-cycle, and one, 25-cycle) extending from the Holtwood Substation to a nearby point of connection with a line owned and operated by PP&L which continues to Lancaster, Pennsylvania; and four 66 kv, 25-cycle, three-phase, transmission circuits extending from the Holtwood Substation to a point of connection with Baltimore Company at Transmission Company's Highlandtown Substation in the City of Baltimore.

(6) Penn Water, Baltimore Company, and Safe Harbor are parties to a contract dated June 1, 1931, as amended, which by its terms is to continue in effect until 1980. Under that contract, Baltimore Company purchases two-thirds, and Penn Water one-third of Safe Harbor's entire capacity and output of electric energy, and contributes annual payments to Safe Harbor in the same proportion. Payments under such contract, pursuant to the Commission's rate order of November 4, 1946, *Safe Harbor Water Power Corporation*, 5 F. P. C. 265, are sufficient to allow Safe Harbor.

a 5% rate of return on net investment, after operating expenses, taxes and depreciation. Under this contract, Penn Water provides, maintains, and operates certain transmission facilities, including lines extending from Safe Harbor, Pennsylvania, to Baltimore, Maryland.

(7) Penn Water and Baltimore Company are also parties to a contract dated December 31, 1927, as amended, which continues in effect until 1980, under which Baltimore Company purchases all of the electric capacity and energy, not otherwise disposed of under existing contracts, which are available from Penn Water's own generating facilities, as well as that available to Penn Water through purchase from Safe Harbor, as referred to in (6) above. Under this contract, Baltimore Company pays Penn Water for all of its operating expenses, including taxes, depreciation, and cost of power purchased from Safe Harbor, as well as a return on investment determined by a prescribed method, with a credit for the revenues which Penn Water receives from sales in Pennsylvania.

(8) By means of the transmission circuits referred to in (5) above, electric energy generated in Pennsylvania and consumed in Maryland and the District of Columbia is transmitted from Pennsylvania, and electric energy generated in Maryland and consumed in Pennsylvania is transmitted from Maryland. None of such facilities is used for the generation of electric energy or in local distribution or only for the transmission of electric energy in intrastate commerce, or for the transmission of electric energy consumed wholly by the transmitter.

(9) The transmission circuits referred to in (5) above are facilities for the transmission of electric energy in interstate commerce within the meaning of Section 201 (b) of the Act and are subject to the jurisdiction of this Commission. By reason of ownership and operation of such facilities, Penn Water and Transmission Company are "public utilities" within the meaning of Part II of the Act.

(10) By means of the transmission network referred to in (5) above, the power resources of Penn Water, Safe Harbor, and Baltimore Company referred to in (1), (2) and (3) above, are combined and coordinately operated as an integrated and interconnected electric system (interconnected system) serving areas in the States of Pennsylvania and Maryland as well as electrification requirements of Railroad in Pennsylvania, Maryland, and the District of Columbia.

(11) The interconnected system is designed and operated to supply its power and energy requirements at lowest cost. The output of each of the interconnected generating units flows into the system at such times and in such amounts as will secure maximum utilization of hydroelectric facilities, economy of operation and reliability of service. The contracts referred to in (6) and (7) above, facilitate the achievement of those objectives particularly by the methods of payment which they provide, and by reason of the fact that generation of energy is directed by the coordinated action of load dispatchers in the City of Baltimore, representing the three system companies. The direction of energy flows results from operations governed by consideration of river flow, relative costs of steam generation, and magnitude of loads; and energy moves from generating plants to loads without regard to state boundaries.

(12) The maximum utilization of the interconnected system's hydroelectric generating plants in Pennsylvania, one Penn Water's and one Safe Harbor's, is obtained through their operation in conjunction with the system's steam-electric generating plants, Penn Water's in Pennsylvania and Baltimore Company's four in Maryland. The Penn Water and Safe Harbor ponds impound only 24 hours' supply of water at full draft. During periods of high river flow, which occur principally in the spring months, the hydro plants generate their maximum output continuously, thus saving the maximum amount of fuel in the generation

of electric energy by steam. At other times, they can be so operated only part time, and are operated as peaking plants, to help carry the peak loads of the interconnected system, thus taking the place of steam-generated energy at those hours when the least economical steam generating plants would otherwise have to be used. The coordinated operation of the system makes available a larger useful system output at a lower cost than would result if each company were compelled to supply its requirements from its own generating facilities.

(13) As a result of the operations referred to in (12) above, during periods of high river flow, the flow of energy is south from Pennsylvania towards Maryland and at other times, the flow of energy tends to be to the north, although the direction of the flow on the lines crossing the state boundary may change frequently according to the needs of the consumers in Pennsylvania and Maryland.

(14) The operation of the interconnected system, referred to in (1) through (13) above, and the output of that system are in interstate commerce.

(15) Penn Water alone sells firm power and energy to Metropolitan Company under a 1945 agreement, to supply a part of the latter's requiremnets in York, Pennsylvania; to Philadelphia Company under a 1933 agreement, to supply its requirements in Coatesville, Pennsylvania; and to PP&L, under a 1933 agreement, to supply its requirements in Lancaster, Pennsylvania. In addition, Penn Water alone sells energy to each of these companies in interchange.

(16) Penn Water's sales, referred to in (15) above, are sales for resale in interstate commerce.

(17) Pursuant to the contract referred to in (7) above, Penn Water sells electric energy to Baltimore Company for resale. Energy so sold is transmitted from Pennsylvania to Maryland and is a sale for resale in interstate commerce. Such sale is made possible by the transmission network, re-

ferred to in (5) above, and by the coordinated operation of the interconnected system, referred to in (1) through (13) above.

(18) Each of Penn Water's sales of electric energy referred to in (7) and (15) above is a sale of electric energy at wholesale in interstate commerce subject to the jurisdiction of the Commission under the provisions of Section 201 (b) of the Act. Each rate and charge made, demanded, or received by Penn Water for or in connection with each such sale, including any rate or charge or part thereof, relating to electric energy, power, capacity, frequency control, phase, cycle, special facilities, transmission service, power factor cooperation, or reactive energy, is subject to the rate regulatory provisions of the Act.

(19) A 1939 order of this Commission required Penn Water to apply for a license under the provisions of Part I of the Act for the operation of its hydroelectric project, and the order was affirmed on court review. Thereafter, this Commission entered an order authorizing issuance of a license to Penn Water, but the matter of formal issuance is still pending. In these circumstances, Penn Water, for rate-regulatory purposes, must be treated as a "licensee" within the meaning of the Act.

(20) So much of the electric energy, or "power" within the meaning of Section 20 of Part I of the Act, generated, or developed, by Penn Water's hydroelectric project, as is sold under the contracts referred to in (7) and (15) above, is sold thereunder for sale and distribution in public service by the purchasing companies, or for sale and distribution or use in public service by their customers. By reason of the coordinated operations of the interconnected system referred to in (1) through (13) above, all such electric energy so sold is sold in, and enters, interstate commerce within the meaning of Section 20.

(21) The "States directly concerned" within the meaning of Section 20 are the States of Pennsylvania and Mary-

land. Such States are "unable to agree" through their properly constituted authorities on the rates or charges of payment within the meaning of that Section.

(22) Penn Water's rates and charges of payment provided for in the contracts described in (7) and (15) above, including any rate or charge, or part thereof, relating to electric energy, power, capacity, frequency control, phase, cycle, special facilities, transmission service, power factor cooperation, or reactive energy, are subject to the jurisdiction of this Commission under Section 20.

(23) Penn Water's rates and charges of payment provided for in the contracts described in (7) and (15) above, including any rate or charge, or part thereof, relating to electric energy, power, capacity, frequency control, phase, cycle, special facilities, transmission service, power factor cooperation, or reactive energy, are subject to the jurisdiction of this Commission under Section 20, irrespective of finding (21) above.

(24) For the purpose of determining whether Penn Water's rates or charges to Baltimore Company, Metropolitan Company, Philadelphia Company and PP&L are and will be excessive, unjust or unreasonable, such rates or charges may properly be tested by determining whether the net operating income of Penn Water produced by such rates or charges constitutes a fair return on a proper rate base, and the respective amounts shown by the record in this proceeding for the year 1946 may properly be used for that purpose.

(25) The actual legitimate investment in Penn Water's and Transmission Company's electric plant used and useful was $33,113,148 as of December 31, 1946, for the purposes referred to in (24) above. For the purpose of determining a proper rate base for Penn Water and Transmission Company for the year 1946, it is fair and reasonable to use that year's average actual legitimate investment in electric plant

used and useful, which was $33,126,585. For each of the periods hereinafter specified in (35) below, it is fair and reasonable to use the foregoing amount of $33,113,148, plus the recorded cost of additions less recorded retirements, as the actual legitimate investment in electric plant used and useful at the beginning of such period, if no substantial property addition is put into service during such period.

(26) The accrued depreciation as of December 31, 1946, was $9,240,628, the amount recorded in the books of Penn Water and Transmission Company as of that date, after proper adjustments. For the purpose of determining a proper rate base for Penn Water for the year 1946, it is fair and reasonable to use as accrued depreciation the average amount for that year which is $9,001,873. For each of the periods specified in (35) below, it is fair and reasonable to use the amount of $9,240,628, as of December 31, 1946, plus or minus the changes recorded on Penn Water's and Transmission Company's books between that date and the date hereof in conformity with the method followed by Penn Water and Transmission Company in 1946, and plus or minus the changes recorded on Penn Water's and Transmission Company's books between the date hereof and the periods referred to in (35) below, in conformity with (27) and (28) below.

(27) The service lives as shown in Exhibit 59 are proper and reasonable for the computation of Penn Water's and Transmission Company's annual depreciation allowance.

(28) The straight-line method of depreciation is the proper and adequate depreciation method for the purposes of computing Penn Water's bills for power and energy in accordance with the Commission's order in this case and for the purpose of accruing depreciation on its books.

(29) The proper and reasonable working capital allowance for the purpose of determining a proper rate base for

Penn Water and Transmission Company, for the year 1946, is not more than $650,000, representing the average amount of materials and supplies plus one-eighth of cash operating expenses for the year, not including taxes and purchased power. For each of the periods hereinafter specified in (35) below, it is fair and reasonable similarly to compute the working capital allowance upon the book, recorded amounts for the immediately preceding 12 months' period.

(30) The proper rate base for the year 1946 for the purposes of determining just and reasonable rates and charges to Metropolitan Company, Philadelphia Company, PP&L and Baltimore Company is not more than $24,774,712, as shown by the following tabulation:

Average Gross Investment for 1946	$33,126,585
Less: Average Reserve for Depreciation for 1946	9,001,873
Average Net Investment for 1946	24,124,712
Working Capital Allowance	650,000
Net Investment Rate Base	$24,774,712

and the rate base so computed reflects the actual legitimate net investment in Penn Water's and Transmission Company's electric plant in service as an assembled whole and an established plant in successful operation.

(31) A fair and reasonable annual rate of return to Penn Water and Transmission Company is 5¼%; the fair return for 1946 is $1,300,672 on a rate base of $24,774,712.

(32) Penn Water's and Transmission Company's net operating income, for 1946, exceeded a fair return by not less than $2,176,736.

(33) On the basis of a reasonable and proper allocation of the cost of service rendered by Penn Water and

Transmission Company to Baltimore Company, the rates and charges to Baltimore Company for 1946 are unjust and unreasonable by approximately $1,733,318.

(34) For the year 1946, on the basis of a reasonable and proper allocation, Penn Water's rates and charges to Philadelphia Company exceed the cost of service to that company by approximately $114,311; its rates and charges to Metropolitan Company exceed the cost of service to that company by approximately $26,094; and its rates and charges to PP&L exceed the cost of service to that company by approximately $80,538.

In the test year 1946, Penn Water received revenues amounting to $1,483,798 from the sale to the Pennsylvania Railroad (in Pa.). The proper allocation of Penn Water's and Transmission Company's total cost of service among Penn Water's customers results in the assignment of $1,261,323 thereof to serving the Pennsylvania Railroad (in Pa.). Accordingly, Penn Water's revenues from that service to Pennsylvania Railroad exceeded the cost of service for the test year 1946 by $222,475, which amount is subject to an adjustment for income taxes.

(35) Except as referred to in (38) below, a proper rate base for the purpose of determining the rates and charges to Baltimore Company for each six months' period following each June 30 and December 31, after issuance hereof, is one computed by adding to the gross investment of $33,113,148 (as of December 31, 1946), as referred to in (25) above, the cost of net additions to electric plant in service from the latter date to said June 30 or December 31; by deducting from the total thus determined the amount of the depreciation reserve as of said June 30 or December 31, according to Penn Water's and Transmission Company's books, adjusted as referred to in (26), (27) and (28) above; and adding working capital computed as referred to in (29) above.

(36) The application of a 5¼% per annum rate of return to the rate base determined as referred to in (35) above, will provide a fair return to Penn Water and Transmission Company.

(37) Penn Water's rates and charges to Baltimore Company will be just and reasonable when the power bill to Baltimore Company is computed by adding to the fair return, referred to in (36) above, all reasonable and necessary operating expenses and depreciation expenses, calculated as referred to in (27) and (28) above, and by deducting the Conowingo backwater payment, and all electric revenues received from others, including Metropolitan Company, Philadelphia Company, PP&L and Railroad. *Provided,* however, that the deduction in respect to revenues from Pennsylvania Railroad shall be only the amount calculated at rates which would have yielded $1,261,323, based on volumes and demands for the test year 1946 and, *Provided,* further, that income taxes associated with revenues from the Railroad in excess of such deduction shall not be included in the costs to be reimbursed by Baltimore Company.

(38) If a substantial addition to property is put in service between the dates for determination of the rate base referred to in (35) above, Penn Water may petition the Commission to include the cost thereof in the rate base from the date of its commercial operation.

The Commission *orders* that:

(A) Penn Water's and Transmission's Company's motion to dismiss for want of jurisdiction be and the same hereby is denied.

(B) The petition of Intervenor, Public Service Commission of Maryland, to reopen the record for the purpose of receiving certain additional evidence be and the same hereby is denied.

(C) Within 45 days after the date of issuance of this order, Penn Water shall file, in a form satisfactory to the Commission, new schedules of rates and charges for or in connection with its transmission and sale of electric energy in interstate commerce for resale to Metropolitan Company, Philadelphia Company and PP&L. The new schedules of rates and charges shall be effective on and after February 1, 1949, and shall effect a reduction, based upon Penn Water's and Transmission Company's operations during the test year 1946, of $26,094 to Metropolitan Company, $114,311 to Philadelphia Company and $80,538 to PP&L.

(D) Within 45 days after the issuance of this order Penn Water shall file in a form satisfactory to the Commission, a new schedule of rates and charges for or in connection with its transmission and sale of electric energy in interstate commerce for resale to Baltimore Company. Said schedule of rates and charges shall be such as, together with the Conowingo backwater payment, the revenues from the sales referred to in (C), above, and a credit for service to the Pennsylvania Railroad computed as set forth in (37), above, will provide a 5¼% return to Penn Water and Transmission Company, after operating expenses and depreciation charges, all as set forth in (37), above, on a rate base to be computed in the manner set forth in (G), below, and shall be effective on and after February 1, 1949.

(E) The Commission reserves the right to reject all or any part of the schedules of rates and charges referred to in Paragraphs (C) and (D) hereof and in lieu thereof to prescribe by further order the appropriate rates, charges, classifications, rules, regulations, practices, or contracts.

(F) Penn Water and Transmission Company shall compute annual depreciation expense beginning February 1, 1949, in accordance with the straight-line depreciation method for the purpose of computing its bills for energy and power, using in connection therewith the service lives which are set forth in Exhibit 59.

(G) For the purpose of determining the rates and charges to Baltimore Company, Penn Water and Transmission Company shall compute a rate base as of June 30, 1949, and as of each December 31 and June 30 thereafter in the manner set forth in findings (25) through (30), and (35), by adding to the amount of actual legitimate investment as of December 31, 1946, as found in (25), above, the net claimed cost, to the date of computation, of additions and retirements in its electric plant used and useful; deducting from this amount the depreciation reserve as of that date according to the companies' books in conformity with (F), above; and adding working capital computed for the period in question, in the manner set forth in finding (29) above.

(H) The rate base computed as set forth in (G), above, shall remain unchanged for the six months period beginning with the date as of which it is computed, provided, however, that in the case of substantial addition to property which is put in service between the dates for determination of the rate base, Penn Water and Transmission Company may petition the Commission to include the cost thereof in the rate base from the date of commercial operation.

(I) Penn Water and Transmission Company shall file on or before May 1, 1949, a statement showing the computation of the rate base referred to in (D)

hereof as of December 31, 1948, and thereafter on or before each May 1, for the preceding calendar year, a statement showing the computation of such rate base in accordance with this order, the operating expenses, depreciation, taxes, and return, and the resulting charges to Baltimore Company under said revised rate schedule.

By the Commission. Commissioner Draper concurring in the result only.

Sgd. LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

(Seal)

Date of Issuance: January 5, 1949.

EXHIBIT E TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matter of
PENNSYLVANIA WATER & POWER COMPANY } Docket No. IT-5915

APPLICATION FOR REHEARING OF ORDER ISSUED

January 5, 1949

(Filed January 28, 1949.)

Pennsylvania Water & Power Company (Penn Water), Respondent in the above proceeding, and Petitioner herein; being aggrieved on its own behalf by the "Order Reducing Rates," issued by the Commission January 5, 1949; and being separately and independently aggrieved by such Order as the owner of one-half of the Class B voting stock of Safe Harbor Water Power Corporation (Safe Harbor), said Safe Harbor being unable to intervene in this proceeding because of the deadlock in its Board of Directors as set forth in the orders of the Pennsylvania Public Utility Commission (Pennsylvania Commission) referred to herein in paragraph II (28) (c), and as agent for and on behalf of Safe Harbor under the provisions of certain contracts with Pennsylvania Power & Light Company (PP&L) and Philadelphia Electric Company (Philadelphia Company); and Susquehanna Transmission Company of Maryland (Transmission Company), Respondent and Petitioner herein, also being aggrieved by said Order; hereby apply to the Federal Power Commission (Commission) for a rehearing as provided by Section 313 (a) of the Federal Power Act (16 U. S. C. 1946 ed. § 825-l (a); 49 Stat. 860), of all of the matters presented or involved in this proceeding and covered or

affected by said Order and the accompanying Opinion No. 173; and pray that said Order and Opinion be abrogated, vacated, set aside, and reversed because of the matters erroneously decided, the errors with respect thereof and the objections of Petitioners to said Opinion and Order to wit: Petitioners respectfully show that in said Opinion and Order the Commission erroneously decided each and all of the following matters and committed each and all of the following errors, and Petitioners object to said Opinion and Order because of each and all of said matters erroneously decided and said errors for each and all of the following reasons; and show that since the record before the Commission was closed there have been substantial changes in the operations and contracts of Petitioner Penn Water, as hereinafter more fully described, so that the bases for the said Order and for many of the findings, conclusions, and requirements contained in said Opinion and Order are destroyed and such findings, conclusions and requirements are not in accord with the facts and the law:

I. The Federal Power Commission has no jurisdiction, authority, or power to issue and enforce said Order for the following reasons:

(1) Section 19 of Part I of the Federal Power Act (16 U. S. C. 1946 ed. § 812; 41 Stat. 1073, 49 Stat. 847) does not authorize or support the issuance of the said Order of the Commission, for the reason that both the States of Pennsylvania and Maryland have each authorized and empowered commissions within each of said States known as the Pennsylvania Public Utility Commission (Pennsylvania Commission) and the Public Service Commission of Maryland (Maryland Commission), respectively, to regulate and control any services to be rendered by Petitioners and the rates and charges of payment therefor, as provided in such Section 19; and there is no substantial evidence of record to the contrary.

(2) Section 20 of Part I of the Federal Power Act (16 U. S. C. 1946 ed. § 813; 41 Stat. 1073, 49 Stat. 847) does

not authorize or support the issuance of the said Order of the Commission, for the reason that the States of Pennsylvania and Maryland, which are directly concerned, have each provided a commission to enforce the requirements of such Section 20 and to regulate and control any services rendered by Petitioners and the rates and charges of payment therefor as therein provided; and that such States are not unable to agree through their properly constituted authorities on the services to be rendered by Petitioners or on the rates and charges of payment therefor; and there is no substantial evidence of record to the contrary.

(3) By its terms the said Order requires the filing of new schedules of rates and charges to be effective within a period of less than thirty days from the date of issuance of such Order, contrary to the requirements of Section 20 of the Federal Power Act insofar as such Section makes applicable the provisions of Section 15 (2) of the Interstate Commerce Act (49 U. S. C. 1946 ed. § 15 (2); 34 Stat. 589, 36 Stat. 551, 41 Stat. 484).

(4) A substantial part of the services rendered by Respondents and Petitioners and the rates and charges of payment therefor do not constitute interstate or foreign commerce, within the meaning of Section 20 of the Federal Power Act; a substantial part of such services and the rates and charges therefor do not constitute the transmission of electric energy in interstate commerce, or the sale of electric energy in interstate commerce, or the sale of electric energy at wholesale, within the meaning of Sections 201 (b), (c), and (d) of Part II of the Federal Power Act (16 U. S. C. 1946 ed. §§ 824 (b), (c), (d); 49 Stat. 847); there is no substantial evidence of record to the contrary; and neither under such Section 20, such Section 201, nor Section 206 (a) of Part II of the Act (16 U. S. C. 1946 ed. § 824 e (a), 49 Stat. 852), nor under any other provision of the Federal Power Act, does the Commission have jurisdiction, authority, or power, to regulate, control, determine,

or fix Petitioners' services or rates, charges, or classifications for services not constituting interstate or foreign commerce, or the rules, regulations, practices, or contracts affecting such rates, charges, or classifications.

(5) None of the provisions of Part II of the Federal Power Act (16 U. S. C. 1946 ed. §§ 824-824 h; 49 Stat. 847) authorize or support the issuance of the said Order of the Commission, for the reason that Penn Water must be treated as a licensee within the meaning of Part I of the Act, and such a licensee is not subject to the rate regulatory provisions of Part II of the Act; for the reasons that:

(a) The services, rates, and charges of Petitioners are completely subject to regulation by the States of Pennsylvania and Maryland under Sections 19 and 20 of the Act, as set forth in paragraph I (1) and I (2) above, within the meaning of Section 201 (a) of the Act (16 U. S. C. 1946 ed. § 824 (a); 49 Stat. 847; and that

(b) Such regulation under Part II of the Act would deprive such States or their respective commissions of their lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across the Pennsylvania-Maryland State line, under Sections 19 and 20 of the Act and under the respective statutes of such States, within the meaning of Section 201 (b) of the Act.

(6) Neither the provisions of Section 206 (a) of the Federal Power Act, nor any other provisions of the Act, authorize or support the issuance of the said Order of the Commission for the reasons that:

(a) Neither Penn Water nor Transmission Company have any rates, charges, or classifications subject to the jurisdiction of the Commission, within the meaning of Section 206 (a) of the Act or of Section 205 of the Act (16 U. S. C. 1946 ed. § 824 d; 49 Stat. 851), in that:

(i) The rendering of services by Penn Water to Metropolitan Edison Company (Metropolitan

Company), and jointly with Safe Harbor to PP&L, and Philadelphia Company, and the rates, charges, and classifications therefor, constitute transactions in intrastate commerce and do not constitute transactions, transmissions, or sales in interstate commerce, within the meaning of Sections 201 (b) and (c) of the Act; and there is no substantial evidence of record to the contrary.

(ii) The rendering of services by Penn Water, jointly with Safe Harbor, Consolidated Gas Electric Light and Power Company of Baltimore (Baltimore Company), and Potomac Electric Power Company (PEPCO) to The Pennsylvania Railroad Company (Railroad), and the rates, charges, and classifications therefor, do not constitute sales of electric energy at wholesale, within the meaning of Sections 206 (a) and 201 (d) of the Act; and there is no substantial evidence of record to the contrary.

(iii) Penn Water has no rates, charges, or classifications for the transmission or sale of electric energy to Baltimore Company, within the meaning of Sections 206 (a) and 201 (b) of the Act.

(iv) Certain of the rates, charges, or classifications of Penn Water, or Penn Water and Safe Harbor jointly, for services rendered to Metropolitan Company, PP&L, and Philadelphia Company are not rates, charges, or classifications for the transmission or sale of electric energy, within the meaning of Sections 206 (a) and 201 (b) of the Act.

(b) The services rendered by Penn Water to PP&L, Philadelphia Company, Railroad Company, and Baltimore Company are rendered jointly with others not made Respondents to these proceedings, and the rates, charges, and classifications therefor are joint; there is no substantial evidence of record to the contrary; and the said Order of the Commission was issued without notice or opportunity for hearing to such other persons jointly obli-

gated to and jointly serving the foregoing customers, contrary to the provisions of Section 206 (a) of the Act and the due process clause of the Fifth Amendment to the Constitution of the United States.

(c) The said Order of the Commission requires Penn Water alone to file new schedules of rates and charges for services to PP&L and Philadelphia Company without requiring Safe Harbor to join or concur in the filing of such schedules, without authority under the Federal Power Act; thereby requiring Penn Water to assume the entire obligations to such customers instead of the joint obligation which exists to the impairment of its ability to render adequate service to its customers, within the meaning of Section 207 of the Act (16 U. S. C. 1946 ed. § 824 f; 49 Stat. 853); and there is no substantial evidence of record to the contrary.

(d) Insofar as the said Order of the Commission undertakes to require a reduction in the revenues of Penn Water alone it constitutes regulation by the Commission of the divisions of revenue received by Penn Water for its participation in the rendering of joint services to each of its customers except Metropolitan Company, without jurisdiction, authority, or power in the Commission to regulate divisions of rates or charges for joint service under the Federal Power Act.

(e) There is no substantial evidence of record to support any finding by the Commission that any of the rates, charges, or classifications, demanded, observed, charged, or collected by Penn Water, or that any rule, regulation, practice, or contract affecting any such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential, as required by Section 206 (a) of the Act or by Section 20 of the Act insofar as such Section 20 makes applicable the provisions of Section 15 (1) of the Interstate Commerce Act (49 U. S. C. 1946 ed. § 15 (1); 24

Stat. 384, 34 Stat. 589, 36 Stat. 551, 41 Stat. 484, 48 Stat. 1162, 54 Stat. 911).

(f) The Commission made no finding in its said Order that any of the existing rates, charges, or classifications for service to PP&L, Philadelphia Company, or Metropolitan Company, are unjust, unreasonable, unduly discriminatory or preferential, as required by Section 206 (a) of the Federal Power Act or by Section 20 of the Act insofar as such Section 20 makes applicable the provisions of Section 15 (1) of the Interstate Commerce Act.

(g) The said Order of the Commission was issued without the hearing required by Section 206 (a) of the Act, by Section 20 of the Act insofar as such Section 20 makes applicable the provisions of Section 15 (1) of the Interstate Commerce Act, and contrary to the provisions of the due process clause of the Fifth Amendment to the Constitution of the United States, in that:

(i) Petitioners were given no notice of the terms or substance of the said Order prior to or during proceedings before the Commission, and were given inadequate description of the subjects and issues involved in the proceedings before the Commission prior to and during such proceedings.

(ii) Petitioners were required to proceed first with unspecified evidence and without the aforesaid notice or description, and were required to carry the burden of proof in the proceedings before the Commission despite the fact that they were not the proponents of any rule or order requiring changes in service, rates, charges, classifications, rules, regulations, practices, or contracts.

(iii) Petitioners were effectively prevented from adequate preparation for and from conducting necessary and reasonable cross-examination of the witnesses for the Commission, and other hostile and adverse

witnesses, required for a full and true disclosure of facts deemed material by the Commission in its said Opinion.

(iv) Petitioners were effectively prevented from adequate preparation for and from a reasonable opportunity for presentation of evidence in rebuttal to evidence presented on behalf of the Commission and other adverse parties near the end of the lengthy proceedings before the Commission, which evidence related to facts relied upon by the Commission in coming to its conclusions in said Opinion and Order and material to the validity of such conclusions; and the Commission's Examiner refused to hear Petitioners' counsel's detailed description of the essential and relevant rebuttal evidence Petitioners would have presented if they had been given the opportunity.

(v) The proceedings before the Commission and the functions of the Commission's Examiner were not conducted by him in an impartial manner, to the prejudice of Petitioners in their presentation of facts for the record.

(vi) Petitioners have had no opportunity to inspect an initial decision by the Commission's Examiner, if any, on the evidence received in the record in the proceedings presided over by him; and although the Commission did not preside at the reception of the evidence of record, no recommended decision by the Examiner who did preside has been filed or made available to Petitioners; the decision of the Commission in said Opinion and Order is not tentative, and the Commission made no finding nor is there evidence of record which would support a finding that due and timely execution of the Commission's functions imperatively and unavoidably require the foregoing procedure omitted by the Commission in issuing its said Opinion and Order.

(vii) No opportunity was afforded Petitioners to submit for the consideration of the Commission

exceptions, with supporting reasons for such exceptions, to the decision or recommended decision to the Commission, of the Commission's Examiner.

(viii) The Commission's said Opinion and Order, and the record before the Commission, do not show the ruling upon each finding, conclusion or requested ruling presented by Petitioners in their Briefs heretofore filed with the Commission in this proceeding; and such Opinion, Order, and record does not include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact and law presented on the record by Petitioners.

(h) Since the record in the proceeding has been closed, the contract of December 31, 1927, providing, among other things, for steam-generated energy service from Baltimore Company to Penn Water at the latter's request, and the purported agreements amendatory and supplemental to said 1927 contract have been terminated as more specifically shown hereinafter in paragraph II (6) (c); and since the closing of such record Penn Water has notified Baltimore Company that it has ceased to receive from Baltimore Company and will not pay for any electric energy or capacity or other electrical services in connection therewith generated in Maryland or elsewhere and transmitted across the Maryland-Pennsylvania State line into Pennsylvania; and that Petitioners' operations have been changed to effect that purpose. As a result of such changes in operations, no such electric energy generated in Maryland, or States other than Pennsylvania has since that date been, nor will be, transmitted from such States of generation into Pennsylvania and consumed in Pennsylvania, except for station uses at Holtwood and Safe Harbor and delivery to the Railroad Company if and when necessary and if given the opportunity on rehearing, Petitioners hereby offer to prove such facts.

(7) If the Federal Power Act can properly be construed otherwise than as described in paragraphs (1), (2), (4), (5), and (6) (a) (i) above, the same is unconstitutional because in violation of the Tenth Amendment to the Constitution of the United States.

(8) The said Order of the Commission requires Petitioners to make changes from time to time in the future in rates and charges for services to Baltimore Company without notice, opportunity for hearing, or findings as of such future times that the then existing rates and charges are unjust, unreasonable, unduly discriminatory, or preferential as of such future times, upon the basis of the facts as of such future times; without authority under the Federal Power Act and contrary to the provisions of Section 206 (a) of the Act; and contrary to Article I, Section 1, of the Constitution of the United States.

(9) The said Order of the Commission, and its Opinion, findings and conclusions, particularly the rates and charges which purport to be thereby determined, fixed, prescribed, and required to be filed, charged, and observed, are unlawful, unconstitutional, unreasonable, arbitrary, capricious, in excess of the Commission's statutory jurisdiction, authority, and limitations under the Federal Power Act and contrary to the provisions of such Act, without observance of the procedure required by law, unsupported by substantial evidence of record; and if enforced would deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

II. Insofar as any of the statements in the Commission's Opinion No. 173, dated January 4, 1949, which was incorporated by reference and made a part of the Commission's Order, issued January 5, 1949; and insofar as the references made in such Opinion No. 173 to discussion or conclusions in the Commission's Opinion No. 143, dated October 25, 1946, in its Docket No. IT-5914, *Re Safe Harbor*

Water Power Corporation; purport to be definite findings of fact or conclusions, or anything more than mere illustrative explanations of the Commission's conclusions, each and all of the following portions thereof are erroneous, unconstitutional, unlawful, arbitrary, capricious, contrary to the evidence of record, unsupported by any substantial evidence of record, and operate to deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and results in exercise of authority in excess of statutory jurisdiction, authority, or limitations; and Petitioners seek rehearing on each and every one of the following portions thereof for the reasons and on the grounds as hereinafter stated:

(1) The statement of the Commission on page 1 of Opinion No. 173 as follows:

> "This is a proceeding under the Federal Power Act * * *"

on the ground that neither in this statement nor anywhere in such Opinion or the record before the Commission has there been any specification as to whether the proceedings or the Commission's said Order are an exercise of authority under Part I or Part II of the Federal Power Act, or any reference to the specific authority of the Commission under which the proceedings were conducted.

(2) The statement of the Commission on page 1 of Opinion No. 173 as follows:

> "* * * The matters at issue involve a determination of * * * the amount, if any, of revenues received by Penn Water in excess of the reasonable cost of service rendered by Penn Water and Transmission Company and of resulting reductions in rates subject to the Commission's jurisdiction."

on the ground that nothing in Section 20, Section 206 (a), or any other provision of the Act authorizes the Commis-

sion to require reductions in rates or charges based upon a determination of an excess of revenues over costs of service when the revenues received by Penn Water are the result of divisions of rates or charges for joint service with others, or when such revenues received by Penn Water are not received under rates or charges for electric energy or electric power service, as more specifically set forth herein in paragaraphs I (6) (a) (iii), I (6) (a) (iv), and I (6) (d) above.

(3) The statement of the Commission on page 4 of Opinion No. 173 as follows:

> "* * * Two 60-cycle generators in Penn Water's steam electric generating plant have a * * * 3-hour peak rating of 28,000 kw.[6] (* * * the base load rating of the steam plant is 26,000 kw at all times.)"

on the ground that if given an opportunity on rehearing Petitioners hereby offer to prove that since the close of the record in the proceeding the 3-hour peak rating of such steam plant has been increased to 30,000 kw and the base load rating has been increased to 28,000 kw.

(4) The statement of the Commission on pages 3 and 4 of Opinion No. 173 as follows:

> "* * * Penn Water, owns and operates * * * that part of an interconnected interstate transmission system * * * located in Pennsylvania. The respondent, Transmission Company, owns and operates that part of the same transmission system * * * located in Maryland."
>
> * * *
>
> "Respondents' interconnected interstate transmission system is a regional network * * *."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) The evidence of record shows that a substantial part of the transmission facilities of Penn Water and Transmission Company are not a part of any interstate transmission system or regional network but are facilities used solely for the transmission and sale of electric energy in intrastate commerce, as more specifically set forth in paragraphs I (4) and I (6) (a) (i); and the Commission failed to so find.

(c) The Gunpowder transmission line owned and operated by Transmission Company in Maryland is not a part of any interconnected system of Penn Water or Transmission Company; and the Commission failed to so find.

(d) As stated in paragraph I (6) (h) above.

(5) The statement of the Commission on page 5 of Opinion No. 173 as follows:

> "Operations of Penn Water, Safe Harbor, and Baltimore Company are closely integrated and coordinated as a matter of economy, efficiency, flexibility, and maximum utilization of hydro capabilities, contracts being carefully worked out for that purpose * * *."

on the ground that the purported contracts referred to in such statement have been terminated since the record in this proceeding has been closed, as more specifically shown hereinafter in paragraphs II (6) (c) and II (7) (c).

(6) The statements of the Commission on pages 2 and 7 of the Opinion No. 173 as follows:

> "Baltimore Company purchases electric power and energy from Penn Water * * *."
>
> * * *
>
> "Under a contract with Baltimore Company, dated December 31, 1927, as supplemented on several occasions thereafter, Penn Water is obligated to pro-

vide Baltimore Company at all times with all the capacity and energy available to the former (Penn Water) from its own hydro and steam generating plants, and from its Safe Harbor one-third entitlement, referred to below, insofar as such power and energy is not required in connection with contracts to which Penn Water is a party and which Baltimore Company has approved. In turn, Penn Water is entitled to obtain from Baltimore Company steam-generated energy in excess of the latter's own requirements up to the limit of its available generating capacity. This contract, according to its terms, is to continue in force until midnight, April 22, 1980.

"Pursuant to the provisions of the supplemental agreement of June 1, 1931, as modified by an agreement of September 29, 1939, Baltimore Company undertakes to pay, on the basis of a formulated power bill, all of Penn Water's operating expenses plus a specified return."

on the grounds that:

(a) There is no substantial evidence of record to support any of such statements, and more particularly the statement that "Penn Water is entitled to obtain from Baltimore Company steam-generated energy in excess of the latter's own requirements up to the limit of its available generating capacity", and that "Baltimore Company undertakes to pay * * * all of Penn Water's operating expenses * * *"; and such statements are contrary to the evidence of record.

(b) The evidence of record shows that the energy which Penn Water was entitled to obtain from Baltimore Company, under the purported contract referred to, was further limited by the requirement that Baltimore Company was not obligated to start up a station which would not otherwise have been operated; and that Balti-

more Company has arbitrarily refused to pay substantial amounts of Penn Water's operating expenses as required under the terms of the purported agreement; and the Commission failed to so find.

(c) Since the record in the proceeding has been closed the purported contract referred to, as supplemented, has been terminated by notice dated December 20, 1948; and if given the opportunity on rehearing Petitioners hereby offer to prove:

(i) The fact of such termination;

(ii) The contract was null, void, and unenforceable because the basic agreements were made at a time when Penn Water and Baltimore Company were affiliated through substantial ownership by Baltimore Company of Penn Water stock and by interlocking directors and officers; the basic agreements were never approved or ratified by the stockholders of Penn Water; the effect of Articles IV and V of the supplemental agreement of June 1, 1931, particularly as construed in practice by Baltimore Company, made the contract *ultra vires* and contrary to public policy; and such supplemental agreement constituted an agreement in unreasonable restraint of trade and in unreasonable restriction of competition in the generation and sale of electrical services, and unreasonably limited the output of electrical energy contrary to the laws of the United States, including Section 1 of the Sherman Antitrust Act of July 2, 1890 (15 U. S. C. 1946 ed. § 1; 26 Stat. 209, 50 Stat. 693), Section 5 of the Federal Trade Commission Act of September 26, 1914 (15 U. S. C. 1946 ed. § 45; 38 Stat. 719), and Section 10 (h) of the Federal Power Act (16 U. S. C. 1946 ed. § 803 (h); 41 Stat. 1068, 49 Stat. 842), and to the laws of Maryland and Pennsylvania;

(iii) Baltimore Company committed material breaches of the contract which justified its termination; and

(iv) The foregoing matters are now in litigation between Penn Water and Baltimore Company on complaint of Penn Water for declaratory and other relief, before the United States District Court for the District of Maryland, Civil Action No. 4179.

(d) The evidence of record shows that under a purported contract between Baltimore Company and Penn Water dated December 31, 1927, as amended on December 28, 1928, June 1, 1931, and September 29, 1939, Baltimore Company agreed to pay specific amounts in accordance with a formula, without regard to the amounts of services received from Penn Water, including the use of specified facilities; and the Commission failed to so find. Since the record in this proceeding has been closed such contract has been terminated, as more specifically shown herein in paragraph (c) above.

(7) The statement of the Commission on pages 7 and 8 of Opinion No. 173 as follows:

> "* * * Penn Water's entitlement from Safe Harbor relates to a fifty-year agreement of June 1, 1931 wherein Safe Harbor agreed with Baltimore Company and Penn Water (and the latter *inter sese*) that * * * the latter companies should be entitled to all of the capacity and energy available from the former's six-unit development in the ratio of two-thirds (to Baltimore Company) and one-third (to Penn Water)."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that under the terms of Articles II and III of the purported three-party agreement referred to Baltimore Company and Penn Water are entitled only to two-thirds and one-third, respectively, of the "total capacity and daily energy avail-

able" from Safe Harbor's hydro development after deduction of any capacity and energy which may be required for the performance of the duty and obligations to serve imposed on Safe Harbor by its charter and otherwise by law including its contractual obligations to Railroad Company, PP&L, and Philadelphia Company.

(c) Since the record in the proceeding has been closed Penn Water has notified Safe Harbor and Baltimore Company that the purported three-party contract referred to, as supplemented, is of no effect, null, void, and unenforceable; and if given the opportunity on rehearing Petitioners hereby offer to prove:

(i) The fact of such notification;

(ii) The contract was null, void, and unenforceable because made at a time when all of the parties were affiliated through stock ownership and interlocking officers and directors, and was part and parcel of the arrangements in connection with which the void two-party contract of June 1, 1931, between Baltimore Company and Penn Water was executed; the effect of the agreements, particularly as construed in practice by Baltimore Company, made the contract *ultra vires* and contrary to public policy; and such agreement constituted an agreement in unreasonable restraint of trade and in unreasonable restriction of competition in the generation and sale of electrical services, and unreasonably limited the output of electrical energy, contrary to the laws of the United States, including Section 1 of the Sherman Antitrust Act, Section 5 of the Federal Trade Commission Act, and Section 10 (h) of the Federal Power Act, and to the laws of Maryland and Pennsylvania;

(iii) Penn Water credits to the account of Safe Harbor an appropriate and reasonable division of revenues received from Pennsylvania customers served jointly by Penn Water and Safe Harbor.

(8) The statement of the Commission on pages 10 and 11 of Opinion No. 173 as follows:

> "Penn Water is further committed • • • to supply the entire electrical power and energy requirements of Philadelphia Company within a defined territory in the Coatesville (Pa.) area; to supply, under certain conditions, all of Pennsylvania Power & Light Company's (PP&L's) Lancaster 25-cycle and 60-cycle load requirements (Lancaster Co., Pa., and adjacent areas), coupled with a contingent obligation to meet a limited deficiency in PP&L's firm load carrying capacity for its Harrisburg area and provide a supplementary secondary capacity service."
>
> • • •
>
> "While Safe Harbor is a party to several of the contracts, its position in the PP&L and Philadelphia Company contracts is a nominal one, involving a legal technicality, which has no bearing or effect upon the operations of the system."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) The evidence of record shows that Safe Harbor is obligated to and does supply jointly with Penn Water the electrical requirements of the Pennsylvania customers referred to; that Safe Harbor's obligations to supply firm services to such customers as well as to Railroad Company are necessary to the rendering of the services required under such contracts, for the reason that the electric capacity and energy available to Penn Water from its own generating resources, plus its purchases from sources other than Safe Harbor, plus only one-third of the available Safe Harbor services, are insufficient to meet the total requirements for firm services required under the contracts

with PP&L, Philadelphia Company, Metropolitan Company, and Railroad Company; and the Commission failed to so find.

(9) The statement of the Commission on page 12 of Opinion No. 173 as follows:

> "* * * Respondents' * * * argument is that a Part I 'licensee' cannot be a 'public utility' under Part II, and that a licensee's interstate wholesale rate may be regulated by the Commission, if at all, only under Part I. The essentials of this argument we considered and rejected in *Safe Harbor Water Power Corporation* (5 FPC 221, 235-237)."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the record as shown by the contentions of Petitioners in their Briefs filed on November 14, 1947 and January 15, 1948, which Briefs are made a part hereof by reference.

(b) The record as shown by such Briefs shows that the contention of Petitioners in this respect is that, assuming Petitioners are "public utilities" within the meaning of Part II of the Federal Power Act by reason of ownership or operation of any facilities subject to the jurisdiction of the Commission as specified in the last sentence of Section 201 (b) of the Act, it does not follow that the Commission has jurisdiction, authority, or power to regulate the rates and charges of such a "public utility" under Section 206 (a) of the Act but must do so, if at all, under Part I of the Act (Main Brief, pp. 13-18; Reply Brief p. 2); and the Commission failed to consider such a contention in the *Safe Harbor* case, or in its Opinion No. 173, and failed to so find.

(c) Nothing stated in the Commission's Opinion No. 143, *Safe Harbor Water Power Corporation*, 5 FPC 221, 235-237, shows a valid ground for the Commission's

conclusion that it has jurisdiction, authority, and power to regulate the rates and charges of a licensee under Part II of the Act; and such conclusion reached therein constituted an error of law as it does in its Opinion No. 173.

(10) The statement of the Commission on page 13 of Opinion No. 173 as follows:

"* * * the provision of 201 (b) relating to State authority over the exportation of hydroelectric energy is inapplicable."

on the grounds that:

(a) As stated in paragraph I (5) above.

(b) Nothing stated in the Commission's Opinion No. 143, *Re Safe Harbor Water Power Corporation*, 5 FPC 221, 235, shows a valid ground for the Commission's conclusion that such provision of Section 201 (b) of the Act is inapplicable; and such conclusion reached therein constitutes an error of law as it does in its Opinion No. 173.

(11) The statements of the Commission on pages 13, 14, and 20 of Opinion No. 173 as follows:

"* * * these [transmission] facilities [across Pennsylvania-Maryland State lines] are used to effect the sale of electric energy by Penn Water to Baltimore Company."

* * *

"It is equally clear that those facilities are also used for sales by Penn Water for resale.[18] (Such sales are Penn Water's sales to Baltimore Company and to Penn Water's Pennsylvania resale customers.)"

* * *

"* * * facilities owned and operated by Respondents include facilities used * * * for 'the sale of electric energy at wholesale in interstate commerce.'"

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) As stated in paragraph I (6) (a) (i), I (6) (a) (iii), and I (6) (h) above.

(12) The statements of the Commission on pages 14, 16, 17, 18, 19, 20, and 22 of Opinion No. 173 as follows:

"* * * Penn Water's sales in Pennsylvania * * * are * * * sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part."

* * *

"* * * contribution [to sales of output of integrated system] * * * of * * * Baltimore Company, being determined by the best use the system can make of the plant's capabilities."

* * *

"* * * electric energy from the numerous system sources [including Baltimore Company] is available for consumption at any point on their combined facilities. Their [including Baltimore Company] power resources and transmission facilities are thus operated as an integrated and coordinated electric system, and all of Respondents' facilities are integral parts of that system."

* * *

"During the rest of the year [other than spring months] the practice is to generate energy at the hydro plants of Penn Water and Safe Harbor so as to assist Baltimore Company in carrying its peak loads during the day, but at other hours and during weekends to stop hydro generation so as to allow the ponds to refill."

* * *

"* * * energy crossing the State boundary, with other system energy, is used to fulfill system requirements."

* * *

"There result times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania."

* * *

"It is accordingly evident that the operations of the unified system enterprise are completely interstate in character * * *."

* * *

"In the making of sales of system energy, such as those by Penn Water to its Pennsylvania utility customers * * *."

* * *

"* * * each of Penn Water's sales in Pennsylvania is clearly a system transaction of a character wholly interstate * * *."

* * *

"In short, Penn Water is selling interstate system energy to purchasers outside the system. Such sales are sales 'in interstate commerce'."

* * *

"* * * all of the energy thus sold [to Baltimore Company] crosses the State line. This latter sale is an intrasystem transaction between two integral corporate parts of the system enterprise, which transaction is ancillary to the consummation of sales of system energy by Baltimore Company to purchasers outside the system, such as PEPCO, or in enabling Baltimore Company's use of that energy for delivery and sale to its resale customers."

* * *

"The energy sold by Safe Harbor, like that sold by Penn Water to its Pennsylvania resale customers, includes varying amounts of energy which never crosses a state line. All are nevertheless sales 'in interstate commerce'."

* * * *

"* * * Safe Harbor's sale is like Penn Water's sale to Baltimore Company in that both are intra-system transactions."

* * * *

"It is also evident that Penn Water's sales to its Pennsylvania resale customers and its sale to Baltimore Company are all sales 'subject to the jurisdiction of the Commission' within the literal terms of Sections 205 and 206.

* * *

"* * * Penn Water's operations are all integral activities of the unified interstate systems, and its sales are sales in 'interstate commerce'."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) The Commission has no jurisdiction, authority, or power to regulate the rates, charges or revenues of a y integrated system, but its jurisdiction is confined, if any, to the regulation of so much of the rates, charges or classifications of "licensees" or "public utilities" under the Federal Power Act as are for transmission or sale of electric energy at wholesale or for power service in interstate commerce; and the Commission failed to so conclude.

(c) The evidence of record shows that Baltimore Company has no obligations, contractual or otherwise, in the rendering of service by Penn Water or by Penn Water jointly with Safe Harbor to Metropolitan

Company, PP&L, and Philadelphia Company, and has no tariffs on file with any commission applicable to such service; that neither Penn Water nor Safe Harbor have any obligations, contractual or otherwise, to render service to PEPCO or to any of Baltimore Company's resale customers; that the interconnected system referred to by the Commission is an arbitrarily defined system assumed by the Commission, having no basis in fact; that the interconnections between Safe Harbor and Penn Water with Baltimore Company, and the operations and interchange of energy which formerly existed thereover were no different from similar interconnections, operations and interchanges with PP&L, Metropolitan Company, Philadelphia Electric, PEPCO, and others; and the Commission failed to so find.

(d) The evidence of record in this proceeding does not support the conclusions of the Court in *Safe Harbor Water Power Corp. v. Federal Power Commission,* 124 F. 2d 800, 802-803, 807, or the conclusions of the Commission in *Re Safe Harbor Water Power Corporation,* 5 FPC 221, with respect to the operations of Safe Harbor, made on the basis of the records in such other proceedings.

(e) As stated in paragraphs I (6) (a) (i), I (6) (a) (ii), I (6) (a) (iii), I (6) (h), II (6), and II (7) above.

(13) The statements of the Commission on pages 15, 16, and 18 of Opinio. No. 173 as follows:

> "* * * at times, energy generated by Baltimore Company or PEPCO is transmitted on these lines in the opposite direction to Safe Harbor. The 60-cycle energy thus received from Maryland * * * is transmitted by Penn Water * * * in part for delivery to PP&L's lines and in part for delivery over two 66 kv circuits (Nos. 15 and 16) to Holtwood. The energy so delivered at Holtwood is sometimes, in whole or in part, energy received at Safe Harbor from Baltimore and Takoma Park, Maryland. It is thereafter delivered * * * to

Philadelphia Company (Coatesville, Pa.), Metropolitan Company (York, Pa.) or PP&L (Lancaster, Pa.), via Circuit No. 18. At times it is also in part converted to 25-cycle three phase energy and transmitted and delivered to PP&L (Circuit No. 3) or to Baltimore Company at Highlandtown substation, or to both."

* * *

"The Highlandtown substation at times also receives from Baltimore Company a smaller amount of 25-cycle energy which is transmitted to Holtwood where it is delivered to PP&L or is converted to 60-cycle energy and delivered by Penn Water, to Safe Harbor or to the Pennsylvania customers."

* * *

"Energy flows in, across, and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day."

on the ground that to the extent any of such statements were supported by the evidence of record, such statements are no longer in accord with the facts as a result of the material changes in operations and contracts occurring after the record was closed, as stated in paragraphs I (6) (h), II (6) and II (7) above.

(14) The statements of the Commission on pages 17 and 18 of Opinion No. 173 as follows:

"The system foundation contracts * * *, governing the operation of the system, were designed to facilitate this completely integrated operation of system generating and transmitting facilities. That purpose found expression in the Supplemental Agreement of June 1, 1931, Article VIII * * *.

"Contributing to the accomplishment of complete integration and pooling of the system's power resources are the provisions for over-all compensation to

Penn Water and Safe Harbor without regard to the amounts delivered or the points at which delivery is made."

* * *

"The very purpose of the system foundation contracts was the elimination of artificial barriers, such as State boundaries."

* * *

"* * * title to energy flowing on the system is of no significance among the companies comprising the system since they physically function as one enterprise and since the compensation features of the system contracts are so designed as to render considerations of title unimportant."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) As stated in paragraphs I (6) (h), II (6) (c), II (7) (c), and II (12) (c) above.

(15) The statement of the Commission on page 19 of Opinion No. 173 as follows:

"The principles by which the foregoing conclusions [Opinion No. 173, pp. 12-19] are reached do not differ from those which must be applied in determining the character of Safe Harbor's sale of its output."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) As stated in paragraphs I (4), I (6) (a), I (6) (b), I (6) (h), II (5), II (7), II (8), II (12), II (13) and II (14) above.

(16) The statements of the Commission on pages 20 and 21 of Opinion No. 173 as follows:

> "Respondents * * * contend that the Commission is without authority over the rate charged for the sales to PP&L, Philadelphia Company and Baltimore Company, claiming that such rates 'are joint rates over which this Commission has no jurisdiction'. This claim apparently rests upon the fact that Safe Harbor is a nominal party to Penn Water's contracts with PP&L and Philadelphia Company and upon the coordinated nature of operations of the integrated system. * * * it does not follow that the rates involved are 'joint' in any sense which removes them from this Commission's regulatory jurisdiction in this proceeding."
>
> * * *
>
> "* * * the real situation there [under Metropolitan Company contract] is precisely the same as that involved in Penn Water's contracts with PP&L and the Philadelphia Company where Safe Harbor is a nominal party."
>
> * * *
>
> "* * * the compensation features of the contracts by which Safe Harbor and Penn Water sell to Baltimore Company clearly refute any suggestion of 'joint rate'. Indeed, the record is replete with evidence, much of it supplied by Penn Water, which shows this 'joint rate' contention to be wholly without substance."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record, are contrary to the evidence of record, and insofar as they consist of a statement of Respondents' contentions are not supported by the record as shown by Petitioners' Briefs, filed November 14, 1947, and January 15, 1948, referred to above.

(b) Such Briefs show (Main Brief, pp. 20-21, 33-38, Reply Brief, pp. 7-8, 14-16) that Respondents never

contended that the Commission lacks jurisdiction over joint rates, but they did and now contend that where rates for joint services are involved the Commission, having no authority to regulate a division of those rates, must have all the parties to a joint rate before it and evidence relating to the reasonableness of the joint rate, not to the divisions thereof.

(c) As stated in paragraphs I (6) (a) (iii), I (6) (b), I (6) (d), II (2), II (8).

(17) The statement of the Commission on page 21 of Opinion No. 173 as follows:

> "* * * Penn Water contends that its rates apply not only to energy but, indivisably, to capacity service, transmission services, frequency control, power-factor cooperation, use of special facilities, and other services, as well as energy, and that this Commission's jurisdiction is limited to rates and charges relating only to the sale of 'energy' in a strictly limited, technical sense. But all of these other so-called services are usual incidents of the wholesale sale of energy and many of them involve no segregable costs of service. The rates here involved, however they may be attributed to energy, capacity, and the other incidents referred to, are clearly within the scope of the statutory reference to 'rates and charges . . . for or in connection with the . . . sale of electric energy subject to the jurisdiction of the Commission' (Section 205 (a)) and to 'any rule, regulation, practice or contract affecting such rate, charge, or classification' (Section 206 (a)). We perceive nothing in Respondents' sales for resale to take them outside the scope of the regulation provided by Congress."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record, is contrary to the evidence

of record, and insofar as it consists of a statement of Respondents' contention is not supported by the record as shown by Petitioners' Briefs, filed November 14, 1947, and January 15, 1948, referred to above.

(b) The evidence of record shows that under the contracts for services with PP&L, Philadelphia Company, Metropolitan Company, and Railroad Company, there are rates and charges for capacity services, the use of special facilities, and other services which are separate from, independent of, are not in connection with, and do not affect any rates, charges, or classifications for any transmission or sale of electric energy; that under the former contract between Penn Water and Baltimore Company the revenues paid by Baltimore Company to Penn Water were paid without regard to the amount of any services rendered, and there are no rates, charges or classifications of Petitioners contained in such contract, as supplemented by the agreement of June 1, 1931, for the transmission or sale of electric energy; and that the services rendered all of such customers, other than transmission and electric energy services, are not usual incidents of any wholesale sale of electric energy, and many of the more important of such services involve costs which may be readily and reasonably segregated; and the Commission failed to so find.

(c) Nothing in Section 205 (a) of the Federal Power Act gives the Commission jurisdiction, authority, or power to regulate, determine or fix any rates or charges; nothing in Section 206 (a) of the Act gives the Commission jurisdiction, authority or power to regulate, determine or fix rates or charges "in connection with" the transmission or sale of electric energy subject to the jurisdiction of the Commission; and nothing in Section 206 (a) of the Act gives the Commission jurisdiction, authority, or power to regulate, determine, or fix any rule, regulation, practice, or contract which may affect any rate, charge, or classification which is not for a transmission or sale of electric energy subject to the jurisdiction of the Commission.

(d) As stated in paragraphs I (6) (a) (iii) and I (6) (a) (iv) above.

(18) The statement of the Commission on page 22 of Opinion No. 173 as follows:

"Since Section 19 deals with intrastate rates, our attention here may be confined to Section 20."

on the grounds that:

(a) Nothing in Section 19 of the Act limits its application to intrastate rates; and the jurisdiction of the Commission under Part I of the Act must be determined by the application of the interrelated provisions of Sections 19 and 20; and the Commission failed to so find.

(b) As stated in paragraph I (4) above.

(19) The statement of the Commission on page 22 of Opinion No. 173 as follows:

"* * * Penn Water's retail deliveries to the Pennsylvania Railroad in Pennsylvania are deliveries in interstate commerce * * *".

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) As stated in paragraphs I (4), I (6) (a) (i) (as applied to Railroad Company), I (6) (a) (ii), II (6), II (7), and II (13) above.

(20) The statement of the Commission on page 22 of Opinion No. 173 as follows:

"By a separate agreement among themselves, to which the Railroad is not a party, Penn Water and Baltimore Company have agreed upon a division, at the State boundary, of their deliveries * * *".

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that by the separate agreement referred to the deliveries to Railroad Company within the States of Pennsylvania and Maryland were used only as an arbitrary measure of the basis for the division of the revenues received under the joint rate with the Railroad Company, and such deliveries do not measure the respective obligations of Penn Water and Baltimore Company, respectively, to the Railroad Company; and the Commission failed to so find.

(21) The statement of the Commission on page 23 of Opinion No. 173 as follows:

> "• • • the record shows that • • • during the course of such participation [by the Commissions of Pennsylvania and Maryland] and in the briefs of their respective counsel, clearly demonstrated that their positions are irreconcilable and that they are 'unable to agree'. Accordingly, we expressly find that the States are 'unable to agree'."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) Such statements are not supported by any findings by the Commission as to the nature of the disagreement by the State Commissions involved.

(c) As stated in paragraph I (2) above.

(22) The statement of the Commission on page 23 of Opinion No. 173 as follows;

> "• • • if Section 20 be construed to confer upon the states a priority of jurisdiction over the interstate

wholesale rates of a licensee-public utility, the conflicting part of Section 20 must be considered repealed by implication, * * *. We reaffirm and need not repeat our discussion of this problem in the Safe Harbor proceeding (5 F. P. C. 231, 239-243). Here, as there, we conclude that whether Section 20 may be given an interpretation avoiding conflict (p. 242)

'. . . or whether the conflicting part of that section be deemed repealed by implication, the finding that the States are unable to agree is not a necessary condition precedent to our authority under that section, for the rates here in question, being interstate wholesale rates held beyond the regulatory power of the States in the *Attleboro* case, *supra*, the condition of Section 20 would be inapplicable. Our jurisdiction, therefore, would not be dependent upon our finding that the States are unable to agree'."

on the grounds that:

(a) Nothing in the Federal Power Act or the legislative history thereof supports the Commission's conclusion that Section 20 is repealed by implication or supports the foregoing statement; and construction of Sections 19 and 20 of the Act, as stated in paragraphs I (1) and I (2) and I (5) above, would avoid conflict between provisions of Parts I and II in the Act.

(b) Nothing in the *Attleboro* case determined that the interstate wholesale rates of licensees for hydroelectric service were beyond the regulatory power of the States when such regulation was authorized by Congress as in Sections 19 and 20 of the Act.

(c) The conclusions reached by the Commission in *Re Safe Harbor Water Power Corporation*, 5 F. P. C. 221, 239-243, constitute erroneous conclusions as a matter of law.

(23) The statement of the Commission on page 24 of Opinion No. 173 as follows:

"• • • Respondents have had a fair hearing on adequate notice.

"The scope of the subjects and issues involved were clearly set forth in the Commission's orders instituting and enlarging the investigation herein and fixing the date of hearing. The detailed position of the Staff with respect to these subjects and issues, as developed during the course of the Staff's investigation, were set forth by Staff's counsel in his opening statement, and at other times during the course of the hearing. There is not the slightest evidence that Respondents were unable to prepare their case because of any alleged vagueness in the specification of issues, • • •.

"Nor were Respondents deprived of an adequate opportunity to present their evidence or to cross examine adverse witnesses."

• • •

"[Respondents'] counsel had • • • ample time in which to prepare and present evidence rebutting Staff's rebuttal.

• • •

"Respondents fail to show that they have been prejudiced by any substantial error in any ruling of the Examiner excluding evidence.

"The record in this proceeding, therefore, does not support Respondents' claim of not having had ample notice and not having had a fair trial."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) As stated in paragraphs I (6) (g) above.

(24) The statement of the Commission on page 139 of Opinion No. 173 as follows:

"Penn Water's revenues, per books, are classified as follows for the year ended December 31, 1946:

SALES OF ELECTRIC ENERGY

* * *

Total Sales of Electric Energy $6,305,198.63"

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) As stated in paragraphs I (6) (a) (iii), I (6) (a) (iv), and II (17) (b), above.

(25) The statement of the Commission on page 140 of Opinion No. 173 as follows:

"Penn Water's operating expenses for the year ended December 31, 1946, * * * as adjusted, are as follows:

* * *

Total operating expenses [as adjusted] $2,973,424."

on the grounds that:

(a) Such statements and adjustments are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) The evidence of record shows that Penn Water's total operating expenses for the year 1946 were not less than $4,053,947, and that such amount reflected the abnormally low operating costs of Safe Harbor for 1946 which were reflected in the abnormally low Safe Harbor power bill of $1,016,501; and that the Commission failed to so find.

(c) There is no substantial evidence of record to support adjustment of the cost of purchased power from

Safe Harbor by $37,063, or justify any failure to find that such adjustment should be substantially further increased.

(d) There is no substantial evidence of record to support the elimination from operating expenses for the year 1946 of the items of rate case expenses ($319,559), "non-operating items" ($15,293), and the adjustment downward of the following items of expense by eliminating the following amounts: Taxes, except federal income taxes ($33,000), Federal income taxes ($643,558); and the Commission has made no findings supporting such eliminations and adjustments.

(26) The statement of the Commission on page 140 of Opinion No. 173 as follows:

> "It is proper in this proceeding to eliminate from operating expenses * * * the rate case expenses, charged in 1946, as this is a non-recurring item, * * *"

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that rate case expenses have been incurred in substantial amounts in every year since 1944; and the Commission failed to so find.

(c) If given the opportunity for rehearing, Petitioners hereby offer to prove that since the record of the proceeding was closed substantial amounts for rate case expenses have been incurred in the years 1947 and 1948 and will continue to be incurred in the reasonably foreseeable future.

(d) The amounts of rate case expense incurred for each year should be allowed in total, or in the alternative an average amount for the years 1944 to date should be allowed as representative of a year's operating expenses for this item.

(27) The statement of the Commission on page 141 of Opinion No. 173 as follows:

> "The item of $15,293 represents miscellaneous costs which Penn Water has classified as non-operating * * *."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that such amount represented salaries and insurance premiums actually paid as operating expenses and accounted for as such, and were eliminated from the Baltimore Company bill under a special agreement which expressly did not determine that such amounts were unreasonable or were not proper operating expenses; and the Commission failed to so find.

(28) The statement of the Commission on page 141 of Opinion No. 173 as follows:

> "The adjustment of the cost of power purchased from Safe Harbor, an increase of $37,063, has been made to give effect to the rate order of this Commission in the *Safe Harbor* case, supra."

on the grounds that:

(a) There is no substantial evidence of record to support any reduction in the rates of Safe Harbor or payments by Penn Water to Safe Harbor; such payments by Penn Water were not for "power purchased", but included Safe Harbor's division of revenues received for joint services to the Pennsylvania customers; and when the rate order of the Commission in the *Safe Harbor* case is finally set aside and enjoined by the United States Circuit (sic) Court of Appeals for the Third Circuit, No. 9345, Penn Water will be required to pay sums to Safe Harbor substantially in excess of $1,053,564 annually.

(b) Since the close of the record in the proceeding Penn Water has notified Baltimore Company and Safe Harbor, as stated in Petitioner's offer of proof in paragraph II (7) (c) (iii) above, of additional credits to Safe Harbor as its division of revenues from the Pennsylvania customers, thereby increasing substantially the amounts Penn Water credits or pays to Safe Harbor.

(c) If given an opportunity on rehearing, Petitioners hereby offer to prove that since the close of the record in the proceeding the Pennsylvania Commission has issued its orders dated September 27, 1948, in its Complaint Docket No. 14028, asserting jurisdiction over the intrastate business of Penn Water and Safe Harbor, and requiring Penn Water and Safe Harbor to file tariffs designed to carry into effect the requirements of the orders which have the effect of substantially changing distribution of charges to customers and revenues between Penn Water and Safe Harbor. Copies of the Pennsylvania Commission's Orders are attached hereto and made a part hereof.

(29) The statement of the Commission on page 141 of Opinion No. 173 as follows:

> "* * * the tax adjustments have been made to reflect the Pennsylvania and Federal income taxes on the basis of a reduction of revenues to yield a fair return of $1,300,672 * * *"

on the ground that any such adjustment results in the failure to determine the justness, reasonableness, or lawfulness of existing rates and charges on the basis of existing expenses, as required by Section 206 (a) or Section 20 of the Act.

(30) The statement of the Commission on page 141 of Opinion No. 173 as follows:

> "The excess revenue for the year ended December 31, 1946 is $2,176,736 * * *"

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) As stated in paragraphs II (25), II (26), II (27), II (28), II (29) above and II (66).

(31) The statement of the Commission on page 142 of Opinion No. 173 as follows:

> "* * * the amount thereof [net revenues from interchange], $1,127,699 has been added to revenues from Baltimore Company."

on the grounds that:

(a) Such statement and adjustment is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that all interchange revenues received by Penn Water, net or otherwise, are received from PP&L, Philadelphia Company, and Metropolitan Company and not from Baltimore Company or as revenues from Baltimore Company, and such adjustment increasing revenues from Baltimore Company is wholly arbitrary and capricious; and the Commission failed to so find.

(32) The statement of the Commission on page 142 of Opinion No. 173 as follows:

> "An adjustment of revenue received for special facilities from Pennsylvania Railroad, in the amount of $141,777, in accordance with the allocation of costs of special facilities, has been made by adding the amount to revenues from Baltimore Company and deducting it from revenues from the Pennsylvania Railroad."

on the grounds that:

(a) Such statement and adjustment is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that Penn Water receives no revenues from the Railroad Company, but its revenues for service to Railroad Company are received as an arbitrary division of the revenues paid Baltimore Company by the Railroad Company, which division was $1,625,575.45 in 1946 and had no basis in the respective costs of Railroad Company service of Penn Water or Baltimore Company; and that such adjustment of Penn Water's division received from Baltimore Company by $141,777, is arbitrary and capricious and without authority under the Federal Power Act; and the Commission failed to so find.

(33) The statement of the Commission on page 142 of Opinion No. 173 as follows:

> "The item of $133,750 representing Conowingo back-water payment has been * * * applied as a reduction of operating costs."

on the grounds that:

(a) Such statement and adjustment is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that the receipt of such miscellaneous revenues does not operate to reduce the cost of service to Baltimore Company or any other customer; and such reduction in operating expenses by an amount equivalent to such miscellaneous revenues is arbitrary and capricious; and the Commission failed to so find.

(34) The statement of the Commission on page 142 of Opinion No. 173 as follows:

> "* * * the gross revenues and cost of service are classified as follows:

Revenues:	
Baltimore Company	$2,386,311
Railroad (in Pa.)	1,483,798
P. P. & L. Co.	1,958,356
Philadelphia Co.	948,861
Metropolitan Co.	667,455
Total Revenues	$7,444,781
Cost of Service:	
Operation and Maintenance	$1,932,625
Purchased Power—Safe Harbor	1,053,564
Taxes	513,483
Depreciation	467,701
Return at 5.25%	1,300,672
Cost of Service	$5,268,045

"The difference between total revenues and the total cost of service, is therefore, $2,176,736."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) As stated in paragraphs II (30), II (31), II (32), and II (33) above.

(35) The statement of the Commission on page 142 of Opinion No. 173 as follows:

"An allocation of cost has been made to determine the cost of service to each customer and the resulting excess revenue therefrom."

on the grounds that:

(a) Such statement is not supported by the evidence of record or the findings or statements in such

Opinion or the accompanying Order, and is contrary to the evidence of record.

(b) The findings or statements of the Commission show on their face that the resulting "excess revenue" determined by the Commission does not result from the allocation of the total costs of service of Penn Water as found by the Commission, but results from arbitrary and capricious adjustments of revenues and expenses and from arbitrary credits to Baltimore Company for an arbitrarily assumed diversion of capacity and energy without any support in the record by substantial evidence; and the Commission failed to so find.

(c) The evidence of record shows that the costs and revenues compared by the Commission as to each customer are, in fact, not comparable in that the services involved in the determination of costs are not the same services involved in the determination of revenues; and the Commission failed to so find.

(36) The statement of the Commission on page 143 of Opinion No. 173 as follows:

> "Staff's witness Davis allocated the total cost of service * * * supplied by Respondents."

on the grounds that:

(a) Such statement is not supported by the evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that Mr. Davis deducted from expenses substantial sums which were not allocated by him, and such deductions were arbitrary, capricious, and not supported by any substantial evidence of record or otherwise justified on the record; and the Commission failed to so find.

(c) The evidence of record shows that the allocation of that part of the costs of Penn Water by Mr. Davis represented by payments to Safe Harbor did not re-

flect the total Safe Harbor costs of service to the Pennsylvania customers which costs were substantially larger than the payments by Penn Water; and the Commission failed to so find.

(37) The statement of the Commission on page 143 of Opinion No. 173 as follows:

> "* * * crediting the latter [Baltimore Company] with an amount of firm energy and capacity supplied by it for use by Penn Water in serving the latter's customers in Pennsylvania."

on the grounds that:

(a) Such statement as to the amount of firm energy and capacity supplied by Baltimore Company is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that Safe Harbor supplied substantial amounts of firm energy and capacity in excess of one-third of its output for use in serving the joint Pennsylvania customers of Penn Water and Safe Harbor; that Baltimore Company had no title or other right to such capacity and energy, and no part of such Safe Harbor supply was supplied by Baltimore Company to Penn Water for use in serving any of the Pennsylvania customers; and the Commission failed to so find.

(c) Since the close of the record in the proceeding Penn Water has notified Baltimore Company and Safe Harbor, as stated in Petitioners' offer of proof in paragraph II (7) (c) (iii) above.

(38) The statement of the Commission on page 145 of Opinion No. 173 as follows:

> "Davis included Penn Water's cost of purchased power as a part of operating expense to be allocated,* * *"

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) The evidence of record shows that Mr. Davis did not include any of the costs of purchased interchange power paid by Penn Water as a part of Penn Water's operating expense to be allocated; that not all of the Safe Harbor costs of serving the Pennsylvania customers were included in the costs allocated, as stated in paragraphs II (25) (b), II (25) (c), II (28), II (36) (c) and II (37) (b), above; that the statements and findings of the Commission show that it committed the same errors in its allocation; and the Commission failed to so find.

(39) The statements of the Commission on pages 145 and 150 of Opinion No. 173 as follows:

> "* * * Davis based a part of his exhibit upon the pooling of investment or costs for all those facilities which he found were used in rendering a service common to all and not specifically applicable to any one customer, and upon a final allocation thereof according to capacity or energy use by each customer."
>
> * * * * * *
>
> "There are no issues here raised with respect to Davis' allocation of * * * the rest of the transmission system, * * * to pool."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) The evidence of record shows that a substantial part of the pool costs allocated by Mr. Davis consisted of the investment and associated costs of the 25-cycle substation and hydro production plants at Holtwood,

which is not used in rendering service common to all customers but is specifically applicable primarily to service to Baltimore Company, with a minor amount of service to PP&L; that as a result of such erroneous assumptions by Mr. Davis with respect to the use of such 25-cycle facilities a substantial portion of Penn Water cost properly allocable to Baltimore Company was not so allocated by Mr. Davis; that to the extent the Commission followed the principles and assumptions of Mr. Davis in this respect it committed the same error; and the Commission failed to so find.

(40) The statement of the Commission on page 147 of Opinion No. 173 as follows:

> "* * * the river-run characteristics of Penn Water's hydro plant (and Safe Harbor's) makes it impracticable for Penn Water to serve the firm requirements of the Pennsylvania customers without the availability of the substantial amounts of off-peak energy which it obtains from Baltimore Company."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) Since the close of the record in the proceedings, the operations of the interconnected systems of Penn Water and Safe Harbor have been so changed that no energy will be obtained from Baltimore Company, as stated in Petitioners' offer of proof in paragraph I (6) (h) above.

(41) The statement of the Commission on page 147 of Opinion No. 173 as follows:

> "* * * the contracts with Pennsylvania customers, providing for economy interchange, are obviously neither designed nor adequate for 'firming' up Penn Water hydro for services to the Pennsylvania cus-

tomers. The very use of the term 'economy' in the contracts describing this type of interchange is demonstrative of such inadequacy."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) Since the close of the record in the proceeding, the 1927 agreement with Baltimore Company providing for backfeed energy has been terminated and no such backfeed is now received, as stated in paragraphs I (6) (h) and II (6) (c), above; and if given the opportunity on rehearing, Petitioners further offer to prove that they can, and will obtain from already available sources in Pennsylvania an ample energy supply to supplement the capacity and energy resources of Safe Harbor and Penn Water to fully meet their firm power obligations to the Pennsylvania resale customers.

(42) The statements of the Commission on pages 147 and 148 of Opinion No. 173 as follows:

"Zinder's allocation does not properly reflect the necessary use of these lines [220 kv] by Penn Water in meeting the firm requirements of the Pennsylvania customers.

"Davis * * * assigned these facilities and their associated costs * * * giving consideration to * * * during two or three months of extreme low river flow the great bulk of energy is being transmitted from Baltimore, to make up the deficiency in Penn Water's firm supply for its Pennsylvania customers; and during the remaining four to six months the facilities are used to transmit energy alternately in either direction, with Penn Water receiving energy from Baltimore Company during off-peak periods of the day, to enable it to store water at such times.

"Giving due consideration to the character of services provided * * * to the Pennsylvania customers by the use of these lines, * * * Davis' allocation of 66-2/3rd directly to Baltimore Company * * *, is found to be reasonable."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record, are contrary to the evidence of record, and allocations based thereon result in a substantial understatement of the costs allocated to Baltimore Company.

(b) As stated in paragraphs I (6) (h), II (11), II (12), and II (13) above.

(43) The statement of the Commission on pages 150 and 151 of Opinion No. 173 showing the allocated special facility costs obtained for each customer on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record which shows such costs to be substantially higher.

(b) The evidence of record shows that the operating expenses shown do not include an allocated portion of all of Penn Water's operating expenses, as stated in paragraphs II (25), II (26), and II (27), above; that the amounts shown for "Bill for Safe Harbor Power" do not include an allocated portion of all the costs of Safe Harbor special facilities, as stated in paragraph II (28) above; that the taxes shown do not include an allocated portion of actual taxes paid, as stated in paragraph II (29) above; that the amounts for return shown are insufficient, as stated in paragraph II (66), and in addition are based

upon rate bases which do not include an allocated portion of general and intangible plant, and as stated in paragraphs II (60), II (61), II (62), II (63), II (64), II (65), and II (67); and the Commission failed to so find.

(44) The statement of the Commission on page 152 of Opinion No. 173 as follows:

> "In charging Pennsylvania customers equitably for energy received, it becomes necessary and proper to * * * credit it [Baltimore Company] for all steam capacity and energy supplied by it and all hydro capacity and energy diverted from it."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record or findings by the Commission, and is contrary to the evidence of record.

(b) The evidence of record shows that no issue was raised in the notice of investigation or otherwise as to the justness, reasonableness, or lawfulness of the rates or charges of Baltimore Company for steam-generated electric capacity and energy service to Penn Water, under Article 6 of the Penn Water-Baltimore Company contract of December 31, 1927, and no such investigation has been made; that any credits to Baltimore Company for any steam-generated electric services, other than at the rates or charges specified in such Article 6, have no basis or support by substantial evidence in the record; that no hydro capacity or energy has been or is diverted from Baltimore Company which would justify any credits on the basis of Baltimore Company steam costs or otherwise, as stated in paragraph II (35) above; and the Commission failed to so find.

(45) The statement of the Commission on pages 152 and 153 of Opinion No. 173 as follows:

> "* * * there should be charged to Baltimore Company the net Holtwood dependable hydro capacity (84,480 kw), less the Holtwood 60 cycle hydro rating (24,000 kw), the Holtwood 25 cycle capacity supplies PP&L (5,000 kw) at Lancaster, Pennsylvania, and the capability of the two 25-60 cycle frequency changers (14,000 kw) at Holtwood."

on the grounds that such statement is not supported by any substantial evidence of record or by any findings or statements of the Commission; is arbitrary, capricious, and contrary to the evidence of record; results in a substantial understatement of the costs allocated to Baltimore Company; there is no justification of record supporting the deduction of the 60-cycle hydro rating (24,000 kw), and such deduction is not an allocation of "dependable hydro capacity" between 25 and 60 cycle services, and such deduction is the deduction of a gross amount before station use and line losses from a net amount after such uses and losses; and there is no justification for deduction of frequency converter capacity in determining dependable hydro capacity at Holtwood available to Baltimore Company.

(46) The statement of the Commission at page 153 of Opinion No. 173 as follows:

> "Spaulding's 50-50 division of costs between capacity and energy is thus patently a departure from cost determination procedure."

on the ground that such statement is not supported by any substantial evidence of record, or by any findings or statements of the Commission, and is contrary to the evidence of record.

(47) The statements of the Commission on pages 155, 156, 157, and 158 of Opinion No. 173 as follows:

"The most important element in Spaulding's determination of capacity available for supply to Baltimore Company was the determination by Respondent's witness Watchorn of 295,000 kw as the dependable hydro capacity of the Holtwood and Safe Harbor plants. * * * This method [Watchorn's] of determining dependable capacity was not used by Penn Water in its operations prior to 1944 and is not only highly speculative but is of unproven reliability from an operating standpoint.

* * *

"A larger allowance for drawdown than that provided by Davis would not only fail to fit into that program [weekly recovery cycle] but the departure therefrom during a period of low flow would undoubtedy adversely affect the sustained peak-carrying hydro capacity of the plants. * * * Davis * * * provision for additional capacity use in the amount of 55,000 kw * * * is an adequate allowance for such intangibles as might inhere. * * *

* * *

"It is therefore found that Davis' determination of dependable capacity is reasonable and acceptable for the purposes of this proceeding and that the determination of the witness Watchorn is not sufficiently supported by established or tested procedures to be reliable and here acceptable."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record or by any findings or statements of the Commission, are contrary to the evi-

dence, and any allocation based thereon results in a substantial understatement of the costs allocated to Baltimore Company.

(b) If given the opportunity on rehearing Petitioners hereby offer to prove that the testimony of the witness Watchorn, characterized as speculative and of unproven reliability, has been verified and shown to be conservative by operating experience of Penn Water and other companies since the close of the record in the proceeding.

(c) If given an opportunity on rehearing Petitioners hereby offer to prove that using Davis' method of determining "dependable hydro capacity" the amount thereof would be increased substantially under 1948 conditions of operation; that the one-hour integrated generation of the Holtwood and Safe Harbor hydro plants for the peak hours of Area 6 (plus the Pennsylvania customers) were 292,000 kwh and 313,000 kwh for 1947 and 1948, respectively, and the total hydro capacity operating and available was 318,000 kw and 328,000 kw for such years, respectively; and that the 1948 hydro load carrying capability which was actually depended upon during such peak hour was 319,000 kw.

(d) The evidence of record shows that the dependable hydro capacity used by Mr. Spaulding was the result of his independent investigation and determination; and the Commission failed to so find.

(48) The allocation of 91,740 kw of dependable capacity to Holtwood, as shown on page 159 of Opinion No. 173 on the ground that such allocation is not supported by any substantial evidence of record or by any findings or statements of the Commission, is contrary to the evidence of record, and any allocation based thereon results in a substantial understatement of the costs allocated to Baltimore Company.

(49) The statement of the Commission on page 160 of Opinion No. 173 that Mr. Davis' deduction of 153,512 kw as the Pennsylvania customer loads corresponded to the deduction for such loads by Mr. Spaulding; on the ground that such statement is not supported by any substantial evidence of record and is contrary to the evidence of record, in that the deduction made by Mr. Spaulding was made upon different factors of dependable capacity and load requirements; and the Commission failed to so find.

(50) The statement of the Commission on pages 160 and 161 of Opinion No. 173 that the Railroad load deducted by Mr. Davis has precedent and is fair, both as to the determination of the demand and as to the allocation of a portion of such demand to Pennsylvania on the basis of energy used; on the ground that such statement is not supported by any substantial evidence of record and is contrary to the evidence of record; and any allocation based upon such a deduction results in a substantial understatement of the costs allocated to Baltimore Company; and if given an opportunity on rehearing Petitioners hereby offer to prove that the actual one-hour integrated Railroad load at the time of the combined Area 6 (plus Pennsylvania customers) peak load was 56,000 kw and 52,000 kw in 1947 and 1948, respectively.

(51) The statement of the Commission on page 161 of Opinion No. 173 that Respondents' objection to any allowance by Mr. Davis of any amount for reserve for Metropolitan Company is without merit and that:

> "* * * the nature of the Metropolitan Company's contract in respect to reserve provision is no different from those of the other customers involved."

on the ground that such statements are not supported by any substantial evidence of record, are contrary to the evidence of record, and any allocation based thereon results in a substantial understatement of the costs allocated to Baltimore Company; and, if given an opportunity on rehear-

ing, Petitioners hereby offer to prove that Metropolitan Company's report on FPC Form 12 for the years 1946 and 1947 show that Metropolitan Company does not rely on any provision for reserve capacity from Penn Water.

(52) The statement of the Commission on pages 161 and 162 of Opinion No. 173 as follows:

"* * * the capacity considered as supplied to and by Baltimore Company is as follows:

	Holtwood Steam (kw)	Holtwood Hydro (kw)	Safe Harbor Hydro (kw)	Total (kw)
Dependable capacity	28,000	91,740	158,260	278,000
Less prorated station use and line losses	2,216	7,260	12,524	22,000
	25,784	84,480	145,736	256,000
Less Baltimore Co's 2/3 rds of Safe Harbor's capacity			97,157	97,157
Less 25 cycle to Highlandtown [126]		41,480		41,480
	25,784	43,000	48,579	117,363
Demands in Pennsylvania [127]				153,512
Balance to be supplied by Baltimore Company				36,149"

* * * * * * *

"126. Dependable 25 and 60 cycle capacity at Holtwood (net); 84,480 kw

Capability two Holtwood frequency converters	14,000 kw	
Holtwood 60 cycle rated capacity	24,000	
PP&L (Lancaster) 25 cycle load	5,000	43,000
		41,480 kw

"127. Coincident demands of Pennsylvania customers plus allowance for reserve:

P. P. & L.	55,000 kw
P. E. Co.	27,000 kw
M. E. Co.	21,000 kw
Penna. R. R.	36,557 kw
10% Reserve	13,955 kw
Total	153,512 kw"

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record; are not supported by any findings or statements of the Commission, and are contrary to the evidence of record.

(b) The evidence of record shows that the dependable capacity assigned to Holtwood of 91,740 kw is understated, for the reasons as stated in paragraphs II (45), II (46), II (47) and II (48) above; that there is no justification for a deduction of 97,157 kw as "Baltimore Co's 2/3rds of Safe Harbor's capacity", for the reasons as stated in paragraph II (7) above; that the coincident demands in Pennsylvania of 153,512 kw are overstated, for the reasons stated in paragraphs II (49), II (50), and II (51) above, and paragraph (c) hereof; and that Baltimore Company supplies no part of the demands in Pennsylvania, for the reasons stated in paragraphs I (6) (h) and II (44) above; and the Commission failed to so find.

(c) The evidence of record shows that under the contract with PP&L, Penn Water and Safe Harbor have the option to reduce their supply to PP&L by 20% during on-peak periods of days of low flow so that in determining the dependable capacity available to Baltimore Company (under conditions of low flow) the actual demand of PP&L should be reduced by 20% to correctly state the dependable capacity actually available to Baltimore Company; that the amount of 153,512 kw less reserve is substantially in excess of the actual coincident demands of the customers shown; that any allocation based upon the deduction of such amount results in a substantial understatement of the costs to Baltimore Company; and the Commission failed to so find.

(d) The evidence of record shows that the coincident demands of Pennsylvania customers deducted

by the Commission in determining the net dependable capacity available for Baltimore Company (5,331 kw), are not the coincident demands of such customers at the time of the peak demand on the system of Penn Water or the system of Penn Water and Safe Harbor; the dependable capacity determined by the Commission to be available to the Baltimore Company is not coincident with and does not measure the maximum demand by Baltimore Company on the system of Penn Water or the system of Penn Water and Safe Harbor; the peak demands on the system of Penn Water or the system of Penn Water and Safe Harbor are substantially different from and are not coincident with the peak demands on the Area 6 system or the system assumed by the Commission; and the Commission failed to so find.

(e) As stated in paragraph II (3).

(53) The statements of the Commission on pages 162 and 163 of Opinion No. 173 as follows:

> "The foregoing total capacity cost ($2,882,478) divided by the Pennsylvania customers' maximum non-coincident demands (154,000 kw) plus the net dependable capacity available for Baltimore Company (5,331 kw) yields a unit capacity cost of approximately $18.09 per kw. This cost applied to an aliquot of the maximum demands of the several Pennsylvania customers on a non-coincident basis and to the 41,480 kw of capacity found proper for allocation to Baltimore Company (*supra*) results in an allocation of the cost of pool capacity as a constituent of total capacity cost as follows:

	Pool Capacity Cost [129]	Baltimore Co. Supply Capacity Cost [130]	Total Capacity Cost
P. P. & L. Co.	$ 927,587	$ 188,724	$1,116,311
Philadelphia Co.	359,959	73,236	433,195
Metropolitan Co.	318,422	64,788	383,210
Railroad (in Pa.)	526,090	107,040	633,130
Baltimore Co.	750,420	(433,788)	316,632
Total	$2,882,478	—	$2,882,478"

"129. Assuming the Pennsylvania maximum demands are each met by Penn Water's capacity and Baltimore Company's supply in the ratio of 117,851 kw and 36,149 kw to the total of 154,000 kw.

"130. Computed at $12 per kw."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) As stated in paragraphs II (25), II (26), II (27), II (28), II (29), II (33), II (35), II (36), II (37), II (38), II (39), II (44), II (45), II (46), II (47), II (48), II (49), II (50), II (51) and II (52) above; II (60) through II (67), inclusive.

(c) Such allocation is made by the Commission on the non-coincident peak basis instead of the coincident peak responsibility basis, without justification in the record and arbitrarily and capriciously; and the evidence of record shows that the non-coincident demands of the various customers used by the Commission are not comparable peak demands; and the Commission failed to so find.

(54) The statements of the Commission on pages 163, 164 and 165 of Opinion No. 173 as follows:

"Holtwood unit energy costs are obtained by dividing the total energy cost ($1,232,563) by the delivery by Penn Water from its Holtwood hydro and steam plant and from its 1/3rd entitlement to Safe Harbor's output, which for 1946 totaled 992,320 mwh. The resulting Holtwood energy cost is 1.24 mills per kwh. * * * Of this 937,950 mwh supplied [to Pennsylvania customers], Penn Water had available 615,636 mwh (992,320 mwh less deliveries of 25 cycle energy to Baltimore Company at Highlandtown) and the remainder required (322,314 mwh) was obtained from Baltimore Company. * * * * using the ratio of Baltimore Company's contribution of 322,314 mwh (34.4%) and Penn Water's of 615,636 mwh (65.6%) to the total of their combined contributions, it is found that Penn Water delivered from its resources 489,835 mwh for firm sales (including the Railroad in Pennsylvania) and 125,801 mwh for interchange sales to Pennsylvania customers and Baltimore Company delivered 256,451 mwh for firm sales and 65,863 mwh for interchange in Pennsylvania. As interchange sales in Pennsylvania are on a when-as-and-if basis, the mwh so supplied by Penn Water comes from Baltimore Company's contract residual entitlement to Penn Water's resources and are therefore deemed to have been made for Baltimore Company's account. On this basis, Baltimore Company received a total of 502,485 mwh at the Holtwood energy cost, made up of deliveries to it at Highlandtown (376,684 mwh) and the amount sold by Penn Water from its own resources as interchange (125,801 mwh). Accordingly, the Pennsylvania customers are deemed to have received 489,835 mwh of firm energy at Holtwood energy cost (1.24 mills/kwh), and 256,451 mwh of firm energy at Baltimore Company's average steam

production cost (4.7 mills/kwh), while Baltimore Company is to be credited with the cost to it of supplying such firm energy against the charge made to it for the 502,485 mwh at the Holtwood energy cost. The allocation of these pool energy costs are as follows:

	Firm Energy Supplied			Firm Energy Cost		
	From Holtwood	From Baltimore	Total	From Holtwood	From Baltimore	Total
TO:	(mwh)	(mwh)	(mwh)	($)	($)	($)
PP&L	202,533	106,036	308,569	251,567	498,367	749,934
Philadelphia Co.	89,022	46,607	135,629	110,574	219,053	329,627
Metropolitan Co.	58,158	30,448	88,606	72,238	143,107	215,345
Railroad (in Pa.)	140,122	73,360	213,482	174,046	344,793	518,839
Sub-Total	489,835	256,451	746,286	608,425	1,205,320	1,813,745
Baltimore Co.	502,485	(256,451)	246,034	624,138	(1,205,320)	(581,182)
Total	992,320	—	992,320	$1,232,563	—	$1,232,563

"The amount of residual hydro energy delivered to Baltimore Company by Respondents in 1946 (502,485 kwh) at the Holtwood energy cost (1.24 mills) combines with the firm energy supplied by Baltimore Company (256,451 mwh) in 1946 for the use of Penn Water's Pennsylvania customers to give a net credit to Baltimore Company, for firm energy supplied by it against residual energy received, in the amount of $581,182."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record or by any findings or statements of the Commission, and are contrary to the evidence of record.

(b) As stated in paragraphs I (6) (h), II (25), II (26), II (27), II (28), II (29), II (33), II (35), II (36), II (37), II (38), II (39), and II (44), above; and II (60) through II (67), inclusive.

(c) If given the opportunity on rehearing Petitioners hereby offer to prove that since the close of the

record in the proceeding the generation of steam energy at Holtwood has substantially increased on a normal annual basis, and that the annual net interchange sales of energy to the Pennsylvania customers are substantially decreased on a normal annual basis.

(55) The statement of the Commission on pages 165 and 166 of Opinion No. 173 as follows:

"The allocated special facility costs added to the allocated hydro capacity cost and the allocated cost of capacity supplied by Baltimore Company (supra) and the firm energy costs give total allocated costs which compare with total revenues as follows:

	Total Costs	Total Revenues	Excess Revenues Amount	Percent
PP&L Co.	$1,877,818	$1,958,356	$ 80,538	3.70
Philadelphia Co.	834,550	948,861	114,311	5.25
Metropolitan Co.	641,361	667,455	26,094	1.20
Railroad (in Pa.)	1,261,323	1,483,798	222,475	10.22
Baltimore Company	652,993	2,386,311	1,733,318	79.63
Total	$5,268,045	$7,444,781	$2,176,736	100.00

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record or by any findings or statements of the Commission, and are contrary to the evidence of record.

(b) As stated in paragraphs II (24), II (30), II (31), II (32), II (33), II (34), II (35), II (43), II (53) and II (54); above.

(56) The statement of the Commission on page 166 of Opinion No. 173 as follows:

"The above determination of excess revenues demonstrates that Penn Water's rates are excessive, unreasonable and discriminatory. It is accordingly found that Respondent shall revise its rates and charges so as to result in a reduction of $80,538 to

P. P. & L. Co., $114,311 to Philadelphia Co., and $26,094 to Metropolitan Company * * *."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record or by any findings or statements of the Commission, and is contrary to the evidence of record.

(b) As stated in paragraph II (55) above.

(c) If given an opportunity on rehearing Petitioners hereby further offer to prove that since the close of the record in the proceeding the orders of the Pennsylvania Commission referred to in paragraph II (28) (c) above, have directed Penn Water and Safe Harbor to change their rates and charges for intrastate services to the Pennsylvania customers referred to, effecting changes in revenues differing substantially from the changes referred to by the Commission and in direct conflict therewith.

(57) The statement of the Commission on page 166 of Opinion No. 173 as follows:

"* * * Baltimore Company in times of severe water shortage may carry the main burden of supplying the foregoing Pennsylvania customers."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record.

(b) As stated in paragraph I (6) (h) above.

(58) The statement of the Commission on page 167 of Opinion No. 173 as follows:

"It is not feasible, because of the nature of Penn Water's operations, for the latter to assume firm commitments to all its customers, including Baltimore Company. The present arrangement whereby * * * Bal-

timore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. That arrangement will, therefore, be continued • • •"

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and contrary to the evidence of record.

(b) As stated in paragraphs II (6) (a) and II (6) (c) above.

(59) The statement of the Commission on page 167 of Opinion No. 173 as follows:

"Penn Water's rates and charges to Baltimore Company will be just and reasonable when the power bill is computed by the use of a fair rate of return and the rate base we have found, brought down to date every six months for changes in the plant investment, depreciation reserve and working capital. In computing the power bill to Baltimore Company there shall be added to the fair return all reasonable and necessary operating expenses, taxes and depreciation computed on the plant investment and at the depreciation rates we have herein found proper; there shall be deducted from such total electric revenues received from others, including the Conowingo backwater payment, and the gross revenues from Metropolitan Co., P. P. & L. Co., and Philadelphia Co., and the gross revenues, except the excess revenues, calculated at $222,475 for the year 1946, and income taxes associated therewith, from Pennsylvania Railroad."

on the grounds that:

(a) Such statement is not supported by any evidence of record and is contrary to the evidence of record.

(b) As stated in paragraph II (55) above.

(60) Petitioners seek rehearing of the following statements, findings, and conclusions on pages 128 to 131, inclusive of the Commission's Opinion No. 173.

1. That Petitioners' claim for $488,092 as the cash component of working capital is not acceptable. (page 128)

2. That Petitioners' claim of $125,000 for "contingencies such as floods, fires, etc., in" working capital is not properly allowable. (pages 128, 129)

3. That Petitioners' claim of $126,000 for rate case expense in working capital is not properly allowable. (page 129)

4. That "the amount of $256,644 represents an adequate amount for the cash component of a working capital allowance." (page 129)

5. That Petitioners' claim of $489,068 for the materials and supplies component in working capital is not acceptable. (page 130)

6. That the recommendation of the Staff that an allowance of $396,421 for the materials and supplies component in working capital "is reasonable and is supported by the evidence." (page 131)

7. That "the amount of $650,000 is herewith allowed in the rate base as Respondents' working capital requirement." (page 131)

on the grounds that:

(a) The statements, findings, and conclusions are not supported by substantial evidence, are contrary to the substantial evidence and are contrary to law and the Federal Power Act; and

(b) The statements, findings, and conclusions result in depriving Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(61) Petitioners seek rehearing of the Commission's Order No. 173 for failure of the Commission to make the following findings and conclusions:

1. That the required cash component in working capital for the year 1946 is $488,092 and an allowance of that amount is proper.

2. That an allowance of $125,000 for 1946 is required as a part of the cash component for "contingencies such as floods, fires, etc."

3. That an allowance of $126,000 for 1946 is required as a part of the cash component for rate case expense.

4. That an allowance of $489,068 is required for the materials and supplies component in working capital and should properly be made.

5. That the amount of $977,160 for working capital for 1946 is required and should be properly allowed.

6. That the Commission's Staff recommendations as to working capital are not supported by the substantial evidence and are contrary to the substantial evidence.

on the grounds that:

(a) The failure to make such findings and conclusions is contrary to law and the Federal Power Act and results in depriving Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(62) Petitioners herein object to and seek rehearing of the following portions of the Commission's Opinion No. 173, relating to the determination of electric plant, rate base and the original cost of Petitioners' property, on the grounds that the Commission erroneously decided each and all of the following statements, matters, findings and conclusions of law and erred with respect thereto in that said

statements, matters, findings and conclusions of law are not supported by substantial evidence, are contrary to the substantial evidence and contrary to law and the Federal Power Act:

1. That it is incumbent upon the Petitioners to show that the amount they claim as cost was cost to an affiliate and not profit. (page 28)

2. That Cary T. Hutchinson's activities culminated in the completion of financial arrangements for the erection of the dam or the incorporation of McCall Company. (page 28)

3. That the "no-profits-to-affiliates" rule applies in connection with the valuation of McCall Company stock. (page 28)

4. That "the original syndicate" enlisted and obtained the aid of Harvey Fisk & Sons. (page 29)

5. That Lee, Higginson & Company and C. A. Coffin, principally or entirely, secured subscriptions of approximately $4,000,000 of bonds. (page 29)

6. That the stock purchase agreement, dated March 25, 1905, was the result of negotiations with the Fisk firm by the original syndicate. (page 29)

7. That any arrangements agreed upon between the syndicate members themselves as to control of the McCall Company, and distribution of its stock, etc., are unknown. (page 29)

8. That bonds totaling $8,075,000, principal amount, were sold at 90 cents on the dollar. (pages 29, 30)

9. That the March 25th agreement is the only contemporaneous evidence which refers to compensation to be received by the Fisk firm. (page 30)

10. That there is no other contemporaneous evidence showing that the Fisk firm received or was en-

titled to compensation other than that hoped to be realized through the resale of the bonds at a price above 90. (page 30)

11. That Mr. Hutchinson was to receive and retain 48,840 shares of common and 4,000 shares of preferred stock of the McCall Company. (page 31)

12. That there is no credible evidence to support Petitioners' claimed distribution of the stock of McCall Company. (page 32)

13. That it is questionable as to whether it was intended that the firm of Bertron, Storrs & Griscom should retain 7,462½ shares as compensation for services rendered. (page 32)

14. That Petitioners' claim must be rejected insofar as it relates to Harvey Fisk & Sons. (page 32)

15. That on the question of control of the McCall Company, Petitioners' claim that Mr. Hutchinson lost control of the enterprise to Harvey Fisk & Sons should be rejected. (page 32)

16. That credible evidence exists to furnish a basis for the Commission to conclude that when the Fisk firm came into the financing, the original promoters merely opened their ranks to an additional member and thereafter all shared control of the McCall Company until it encountered financial difficulties and went into receivership. (page 32)

17. That during the period, March 1905 to December 1908, control of McCall Company was shared by Mr. Hutchinson with Bertron, Storrs & Griscom; Lee, Higginson & Company; C. A. Coffin, and Harvey Fisk & Sons as a result of a pooling of their interests. (page 33)

18. That each of three interests was represented on the voting trust committee. (page 33)

19. That the fact that each interest was represented on the McCall Company Executive Committee indicates each interest shared in control. (page 33)

20. That the letter of January (July) 19, 1907 indicates that the management of the McCall Company was in the hands of a committee on which was a member of each of three banking firms. (page 33)

21. That the letter dated June 22, 1906 from Mr. Hutchinson to Mr. Dimock indicates that control of the McCall Company was jointly shared. (page 33)

22. That Petitioners failed to show that the Fisk firm controlled the directors and the McCall Company. (page 34)

23. That the McCall Company was not controlled solely by Harvey Fisk & Sons but that control was shared with Hutchinson and the other interests. (page 34)

24. That the affidavits of Messrs. Hutchinson, Fisk, Lee and Hopkins fail to state (1) that their respective valuations of the common stock represent cash value of the stock in June 1905 and (2) that those parties purchased any of the McCall Company stock at the valuations set forth by them in said affidavits. (page 35)

25. That Petitioners' selection of $25.00 per share for the common stock and $50 per share of (sic) [for] preferred stock of McCall Company is unsupported by the valuations of Messrs. Hutchinson, Fisk, Lee and Hopkins. (pages 35, 36)

26. That the record contains no showing that Mr. Lee was in fact unavailable to testify because of age, health or other reasons. (page 36)

27. That Petitioners' failure to produce the attorney who obtained the Fisk affidavit or the physician who prepared an affidavit to the effect that Mr. Hutchinson had the ability to understand the purport of his actions had

any adverse effect upon the weight to be accorded to the affidavits of Messrs. Fisk and Hutchinson. (page 36)

28. That the record fails to show what duties, if any, Mr. Lee had in connection with the firm of Lee, Higginson & Company's financing activities with regard to the McCall Company. (page 37)

29. That the fact that Mr. Lee was not presented for cross-examination makes his opinion unreliable for the purposes of determining the cash value of the stock involved in Petitioners' claim. (page 37)

30. That the fact that Mr. Fisk stated his recollection had been dimmed by a lapse of years and that he had taken very little active interest in the McCall enterprise indicated his valuation of the stock was entitled to no weight. (page 37)

31. That Mr. Fisk's method of valuing the stock proceeded upon a questionable assumption. (page 37)

32. That there is no merit to the contention that the Fisk firm received stock compensation for either financial or management services or that Mr. Fisk's $50.00 valuation for preferred and $18.00 valuation for common stock of McCall Company were arrived at by valuing non-existent services. (page 37)

33. That Mr. Hutchinson's method of valuing the common stock of McCall Company starts with an unestablished premise and is contrary to Section 14 of the Federal Power Act providing that "net investment shall not include or be affected by * * * prospective revenues." (page 38)

34. That the letter of January 19, 1906 written by Mr. Hutchinson refutes or is at variance with Mr. Hutchinson's or Petitioners' claimed value for the stock of McCall Company. (page 38)

35. That the Hutchinson affidavit was prepared upon the basis of representations made by Petitioners witness Gunn to an attorney in Miami, Florida. (page 38)

36. That Mr. Hutchinson had only four days to consider the facts before he executed his affidavit. (page 38)

37. That Petitioners witness Gunn did not ascertain the facts with reference to the points mentioned in his letter of January 9, 1939, prior to that date. (pages 39, 40)

38. That the information in the possession of Mr. Hutchinson at the time he signed his affidavit was insufficient to permit him to recall the true facts. (page 39)

39. That the weight to be given to Mr. Hutchinson's affidavit is adversely affected by the fact that Petitioners witness Gunn had not secured complete information from Mr. Fisk before securing Mr. Hutchinson's affidavit. (page 40)

40. That Messrs. Fisk and Hutchinson did not have sufficient information nor sufficient time to study the facts prior to the time they executed their affidavits. (pages 38, 39, 40)

41. That a comparison of excerpts from the letter, dated January 9, 1939, with Mr. Hutchinson's affidavit "reveals the extent to which Gunn's tentative 'story' crystalized into a categorical statement of fact within the brief span of one or two days, although, apparently, he had obtained no further information". (page 40)

42. That Petitioners witness Uhl's valuation was based entirely upon engineering factors designed to reflect power site value and had no relation to cost. (page 41)

43. That Petitioners witness Uhl's method of valuation has been held either by the Commission or the

courts to be of no probative value in determining the costs of a project. (page 41)

44. That Petitioners have not sustained their claimed cash values of $25.00 and $50.00, respectively, for the common and preferred stock of the McCall Company. (page 41)

45. That it is clear that the stock of McCall Company could have had no cash value at all at the time Petitioners claimed a $25.00 and $50.000 value. (page 41)

46. That Petitioners' claimed value for the stock of McCall Company was erroneous because that company was at the time in question a newly created company, had no formal contracts for the sale of power, had not perfected finally the specifications for the development of the project, the development was a pioneer project, and because the exact location of the dam had not been determined. (pages 41, 42)

47. That the fact that the development had a large initial investment and heavy prior charges for bond interest contributed in some way to a lack of cash value for the stock of McCall Company. (page 42)

48. That the financial difficulties encountered which necessitated calling in the Fisk firm indicated that the stock of the McCall Company could have not been sold for cash. (page 42)

49. That the testimony of Mr. J. H. Harlow indicated that the stock of the McCall Company had no cash value at the time Petitioners claim a value for same. (page 42)

50. That the common and preferred stock of the McCall Company had no cash value in 1905 and the aggregate cash value claimed by Petitioners should be disallowed. (page 43)

51. That there are additional grounds for the disallowance of most of Petitioners' claimed cost sought

to be established by the use of the cash value claimed for the common and preferred stock of McCall Company. (page 43)

52. That the common stock of McCall Company had no cash value. (page 44)

53. That assuming for purposes of argument McCall Company's stock received by Mr. Hutchinson in payment for his land, water rights, services, etc., had a cash value, Petitioners' claim would still have to be disallowed. (page 44)

54. That Mr. Hutchinson was paid $750,000 cash for 2896.54 acres of land and water rights. (page 44)

55. That the cost estimate prepared by Mr. Hutchinson on December 18, 1905 lists the cost to McCall Company of his properties as $750,000. (page 44)

56. That there is other credible evidence that the cost to McCall Company of Mr. Hutchinson's properties was $750,000. (page 44)

57. That Mr. Hutchinson was at all times in control or sharing in control of the McCall Company. (page 44)

58. That the "no-profits-to-affiliates" rule applies in connection with Mr. Hutchinson's transactions with McCall Company. (page 44)

59. That in Mr. Hutchinson's transactions with McCall Ferry Power Company there was a lack of an arm's-length transaction and that there was no showing of costs incurred by Mr. Hutchinson in excess of the $750,000 cash payment. (page 44)

60. That Mr. Hutchinson paid $155,000 for half of his properties which he had acquired from York Furnace Power Company. (page 45)

61. That it is reasonable to assume from the known prices paid for a few of Mr. Hutchinson's parcels

of land that the cost of the other half of his land and water rights was less than or did not exceed the $155,000 paid for the York Furnace properties. (page 45)

62. That the total price of all of Mr. Hutchinson's properties was not more than $310,000 or that $440,000 was paid to Mr. Hutchinson to cover his other expenditures and as compensation for other efforts. (page 45)

63. That Mr. Hutchinson's expenditures in connection with acquiring his land and water rights are not proper project costs. (page 45)

64. That Mr. Hutchinson's costs which he incurred in connection with his activities should be disallowed in view of the 6% interest allowance made by the Commission to Petitioners. (page 45)

65. That expenditures made by Mr. Hutchinson to secure the enactment of legislation favorable to his plan are disallowable. (pages 45, 46)

66. That it was abundantly fair to Petitioners to allow as actual legitimate original cost only the $750,000 cash paid to Mr. Hutchinson. (page 46)

67. That the McCall Company stock had no cash value when issued. (page 46)

68. That Petitioners' claim of $28,750 for 1,150 shares of common stock issued by McCall Company to the Harlow-McGaw interests and C. D. Pullen must be disallowed. (page 46)

69. That 10 shares of McCall Company's common stock was given Mr. Hutchinson in exchange for the stock of the merged companies. (page 46)

70. That the ten incorporators' shares of common stock of the McCall Company issued to Mr. Hutchinson in exchange for the stock of merged companies, had no value. (page 46)

71. That the issuance of the ten incorporators' shares of common stock of the McCall Company was not proper organization expense. (page 46)

72. That it is reasonable to conclude that the $750,000 cash payment Mr. Hutchinson received for his properties covered all costs previously incurred by him including the cost of incorporating the predecessor companies. (page 47)

73. That the $250.00 valuation for the ten incorporators' shares of McCall [Ferry] Power Company common stock should not be allowed as part of Petitioners' rate base. (page 47)

74. That "such excess [$49,000] lacks any color of support in the Fisk affidavit". (page 47)

75. That the McCall Company stock had no cash value when issued and the distribution claimed by Petitioners to the Fisk firm was not sustained by the evidence. (page 48)

76. That there is no basis in the evidence for the contention that the Fisk firm rendered management services. (page 48)

77. That allowance of any portion of the claim of the Fisk firm for management or banking services would do violence to the "no-profits-to-affiliates" rule. (page 48)

78. That allowance of any portion of the claim for Fisk management or banking services would do violence to the "no-profits-to-affiliates" rule irrespective of whether the Fisk firm shared control of the McCall Company or exercised control singly over that company. (page 48)

79. That neither the March 25, 1905 financing plan nor any other contemporary evidence of record supports the contention that the Fisk firm managed the McCall Company. (page 48)

80. That it was contemplated in the event that the development proved successful, bonds might be repurchased and resold by the Fisk firm at a profit. (page 48)

81. That there is an absence of evidence indicating the Fisk firm performed management and banking services. (page 49)

82. That it is entirely possible that it was the intention of the syndicate members that the Fisk firm was to be compensated for its services through the repurchase and resale of the bonds. (page 49)

83. That there is no evidence showing that Harvey Fisk & Sons were consulted on matters of policy, the construction of the project, the allocation of funds, the expenditures of the McCall Company, the selection of personnel, the negotiation of power contracts, the conduct of law actions, the determination of the ultimate level at which it was decided to build the crest of the dam, the cessation of construction activities in 1907. (page 49)

84. That the evidence is that Harvey Fisk & Sons had no more to do with management than each of the others participating in promotion of the development. (page 49)

85. That correspondence of Lee, Higginson & Company, dated July 19, 1907, discloses that Harvey Fisk & Sons was not in sole control of the management of the enterprise. (page 49)

86. That Staff accounting witness Newlands was competent to testify. (page 49)

87. That the fact that Staff accounting witness's search of Petitioners' files failed to disclose to him any indication of management activities on the part of Harvey Fisk & Sons proves lack of management services rendered by that firm. (page 49)

88. That the absence of management services was indicated by the fact that Staff witness Newlands was unable to find any communication from or to the Fisk firm or Mr. Barnum dealing with management of McCall Company. (page 50)

89. That the lack of management services by the Fisk firm was indicated by the fact that Staff witness Newlands' examination of the files indicated to him that it was the President of the McCall Company to whom reports and communications were addressed. (page 50)

90. That Petitioners witness Gunn testified that the Fisk firm never received any amount of stock for management services as distinguished from financial services. (page 50)

91. That Petitioners witness Gunn testified that he knew of no contracts negotiated by Mr. Barnum or of any reports or management functions which the McCall Company officers cleared through the Fisk firm or Mr. Barnum. (page 50)

92. That the fact that Petitioners witness Gunn could not point to any matter, which Mr. Barnum was instructed to investigate or which he introduced at Executive Committee meetings or to any written orders or communications relating to management or construction issued by the Fisk firm or Mr. Barnum to officers of McCall Company or to the construction contractors and could not identify any individual who was employed by Mr. Barnum for McCall Company indicates lack of control by the Fisk firm. (page 50)

93. That there is no evidence to support the contention that the Fisk firm rendered management services. (page 50)

94. That the evidence shows that there was no necessity for the rendition of management services by the Fisk firm. (page 50)

95. That the statements contained in the Fisk affidavit are at variance with the facts established by any evidence. (page 51)

96. That the responsibility for management rested with the Company officers, its special Board of Advisory Engineers or someone else, to the exclusion of the Fisk's firm sole management prerogative. (pages 51, 52)

97. That there exists no justification for the allowance of the amount of $199,570.31 and that this amount must be excluded from Petitioners' rate base. (page 52)

98. That the item of $81,906.59 claimed by Petitioners was erroneously classified in Account 301, Organization Expense, and that this amount is chargeable to Account 151, Capital Stock expense. (page 52)

99. That issuance of additional stock after actual organization neither entails organization expense within the meaning of Account 301 nor represents an "extension" of the organization of Penn Water. (pages 52, 53)

100. That Hutchinson arranged for the employment of the Board of Advisory Engineers and that contracts with Mr. Cooper and Sanderson & Porter were negotiated by Messrs. Dimock and Coffin. (page 52)

101. That Petitioners' claim that the bankers received McCall Company's stock as compensation for the sale of $8,075,000 of bonds. (page 53)

102. That the amount of $331,703.15 is not properly includible in Petitioners' rate base. (page 54)

103. That the McCall Company stock had no cash value. (page 54)

104. That Petitioners' claimed distribution of stock to the bankers was not sustained by credible evidence. (page 54)

105. That, therefore, no cost was incurred by its issuance which could have been carried forward under the Aldred Plan. (page 54)

106. That no part of the claim for McCall Company's stock could be allowed because of the "no-profits-to-affiliates" rule. (page 55)

107. That there was an absence of a showing of cost to the bankers of services rendered by them. (page 55)

108. That the bankers were affiliated. (page 55)

109. That any such cost would be a financing cost, not a cost to physical property and the 6% interest allowance hereinafter made is in lieu of all other financing costs. (page 55)

110. That the amount claimed by Petitioners for stock issuance expense is not properly includible in Account 301, Organization Expense. (page 55)

111. That the agreement between Mr. Aldred and the McCall Company Bondholders Committee did not expressly vest Mr. Aldred with management powers. (page 56)

112. That there is no credible evidence on the basis of which it can be determined that the parties so construed the agreement between Mr. Aldred and the McCall Company Bondholders Committee. (page 56)

113. That the failure of Staff witness Newlands to find in Petitioners' files any indication that the Bondholders Committee had arranged for management services to be rendered by Mr. Aldred indicates the lack of such management services. (page 56)

114. That surveys made by Mr. Aldred were solely for the purpose of informing himself in connection with his negotiations concerning the refinancing. (page 57)

115. That there is no proof that any management services were rendered by Mr. Aldred prior to the date of the memorandum of understanding with the Bondholders Committee of April 24, 1909. (page 57)

116. That it is apparent that as of May 20, 1909 and August 5, 1909, Mr. Aldred understood that his phase of the managership was to be conducted in his capacity as receiver. (page 57)

117. That as to none of the eight contracts is it shown that at the time of the execution, Mr. Aldred had made up his mind to act otherwise than in his capacity as receiver. (page 59)

118. That nowhere does it appear that Mr. Aldred was put to any personal expense in connection with any liability he may have technically assumed under these contracts. (page 59)

119. That Mr. Aldred's statement in his affidavit that "to expedite the work * * * it became incumbent on me to enter into a number of contracts, personally" is contrary to what he did. (page 59)

120. That Mr. Aldred received adequate compensation for his management services in the fee he claimed and was granted by the court as receiver. (page 60)

121. That there was no period of time during which Mr. Aldred rendered management services that he was not either under employment as receiver of McCall Company or an officer of Penn Water (page 60)

122. That the fact that Mr. Aldred was at one time a receiver of McCall Company and later an officer of Penn Water indicates he failed to perform the management services claimed by Petitioners. (page 60)

123. That there is no evidence that the term, "management," as the parties to the refinancing plan used

it, ever meant or was intended to mean anything more than the "control" that Mr. Aldred exercised as receiver or as an officer of Penn Water or under the voting trust. (page 60)

124. That Staff witness Newlands' failure to find that Mr. Aldred was to perform any duties in addition to those for which he was paid compensation as receiver and as an officer of Penn Water indicates that Mr. Aldred failed to perform valid management services for which he was entitled to the compensation claimed by Petitioners. (page 60)

125. That the 5,000 shares of Penn Water stock which Mr. Aldred received could only have represented an expectation of an indefinite realization of the future operating income of the Company. (page 61)

126. That Penn Water stock had no cash value as of the time of its issuance and that no cash value was indicated for the immediate future for Penn Water stock. (page 61)

127. That Mr. Aldred stated that Penn Water stock had no cash value. (page 61)

128. That the 5,000 shares of stock issued to Mr. Aldred was for financing services and not a part of the project cost. (page 61)

129. That due allowance for Petitioners' claimed management services in behalf of Mr. Aldred was made by the Commission in the allowance of 6% interest by them. (page 61)

130. That quotations of sales of Penn Water stock proved by Petitioners are not evidence that the stock had a cash value at the time of its issuance. (page 61)

131. That the conversion of 66 McCall Company bonds afforded no evidence as to the value as to McCall stock. (page 61)

132. That the sum of $218,750 is properly disallowed by the Commission. (page 61)

133. That estimates made at that time (June 20, 1906) disclosed that a 165 ft. dam at McCall Ferry with 7 initial units providing an output of 50,000 hp. would cost $8,859,000. (page 64)

134. That on November 1, 1907 work on the dam ceased and the work on the tailrace, walls and other parts of the powerhouse stopped. (page 65)

135. That only such men were retained as were deemed needed to guard the completed work against danger during the winter, put the construction equipment in winter quarters and for minor work in the powerhouse. (page 65)

136. That the work, as a whole, was estimated 80% completed. (page 65)

137. That in April 1908, provision was made for resuming work on the tailrace, cleaning up around the powerhouse and raising the wing dam. (page 65)

138. That after the first and through the 22nd of November 1907, there were never more than 124 men employed on any one day at the site, and these were employed on concrete and form work, some repairs and miscellaneous minor matters, and that the work included placing of only 600 yards of concrete in the powerhouse substructure for protection against water, and 130 yards in arches as protection against ice. (page 65)

139. That by February 1, 1908 none of the hydraulic engineer's construction organization was considered necessary. (page 65)

140. That from November 1908, no further work was done at the site until after Mr. Aldred became receiver in July 1909. (page 66)

141. That construction work was resumed approximately on September 1, 1909. (page 66)

142. That there is no evidence that the 1907-1909 cessation can be attributed to the fact that the Knickerbocker Trust Company went into receivership in October 1907. (page 67)

143. That the Knickerbocker Trust Company was not obligated on call for funds for project construction purposes as of October 1907. (page 67)

144. That the shortages of finances had not taken the officers of McCall Company by surprise. (page 67)

145. That Mr. Hutchinson stated, in effect, that the omission to take steps to provide more money led to the Company's discontinuance of construction. (page 67)

146. That Mr. Hutchinson stated that cessation was due to delays and not the economic depression. (page 67)

147. That the evidence fails to prove that the work performed during the cessation period contributed to shortening the construction period. (page 67)

148. That interest during construction should not be allowed for the period November 1, 1907 to August 31, 1909, inclusive. (page 67)

149. That the initial plant was conceived as a 7-unit project. (page 68)

150. That the available market was not determined at the time the initial plant was first projected. (page 68)

151. That Unit No. 1 was first subject to a minor bearing defect. (page 68)

152. That Unit No. 1 was always considered operational. (page 68)

153. That Units Nos. 2 and 3 operated without outages arising from known causes until after October 1, 1911. (page 69)

154. That Unit No. 4 experienced no outages prior to October 1, 1911. (page 69)

155. That transformers Nos. 1, 2 and 3 experienced outages for only brief periods during the first six months of 1911. (page 69)

156. That from June 1 to October 1, 1911, Petitioners did not have less than a rated normal transformer capacity available of 22,500 kw., which was approximately sufficient to carry the combined Baltimore load. (pages 69, 70)

157. That early in March 1911, Petitioners were supplying the contract requirements of Baltimore Company from two units. (page 70)

158. That for causes not satisfactorily established in the evidence, Baltimore Company's load dropped. (page 70)

159. That the evidence indicates that the delivery of power to Baltimore Company was going along very well in mid May 1911. (page 70)

160. That the work of preparation for delivery of power to United Railways Company was going along in fine shape. (page 70)

161. That Petitioners were ready to deliver power to the United Company by June 15, 1911. (page 70)

162. That it was significant that the United Company experienced none of the service interruptions previously experienced by the Baltimore Company. (page 71)

163. That the remaining three causes of total interruption to service in 1911 were "causes not here significant". (page 71)

164. That all other interruptions were caused by customers' systems, or were insignificant in effect. (page 71)

165. That interruptions stated in total elapsed time of 1 hr.-49 minutes and 1 hr.-12 minutes indicate that Petitioners' service was reliable. (page 71)

166. That Petitioners' difficulty with lightning was not peculiar to their system. (page 71)

167. That the Commission considered all of the pertinent facts in determining the date of the beginning of commercial operation of the project. (page 72)

168. That suspension of machines for supplemental construction does not influence the determination of the date of beginning of commercial operation. (page 72)

169. That outages do not influence the determination of the date of beginning of commercial operation. (page 72)

170. That the date of the end of the construction period was June 30, 1911 and that interest is capitalizable only through that date except for the "cessation period" and net revenues should be credited to cost of plant up to that time. (page 72)

171. That Petitioners witness Gunn admitted that the contribution of the office work done during the cessation period, to the shortening of construction after the resumption of work, cannot be determined. (page 74)

172. That Petitioners' contention that the salary of the Vice President and General Manager and the Secretary and Treasurer of McCall Company should be included in the rate base because their services related to plant designing during the period, is based upon unsupported inferences. (page 75)

173. That Mr. Hutchinson was not during the cessation period in direct supervision of construction. (page 75)

174. That Mr. Cooper was paid for work he did not do. (page 75)

175. That Sanderson & Porter never did more than prepare certain designs. (page 75)

176. That Petitioners witness Gunn's opinion that general engineering conducted during the cessation period contributed to decrease the time necessary to complete the project after assumption of construction is based upon speculation. (page 75)

177. That there is no showing that the general designing, planning and administration of the cessation period served to shorten the following period of construction. (pages 75-76)

178. That the amounts claimed by Petitioners representing expenditures during the cessation period should not be included in the rate base. (page 76)

179. That organization expense generally or as referred to in Account 71 of the ICC Classification of Investment in Road and Equipment of Steam Roads are usually incurred at the inception of a company and not over a period of years subsequent thereto. (page 76)

180. That Petitioners conceded that it is impossible to tell what the so-called promotion expenses incurred from 1911 to 1914 represent. (page 76)

181. That Petitioners witness Gunn stated that the item of stock issuance expense represented an unsegregatable amount. (page 77)

182. That Petitioners witness Gunn could not state the nature of the activities of the officers whose salaries were partly charged as promotion expense, nor the purpose of charging office rent or traveling expense. (page 76)

183. That the nature of the items making up the claimed promotion expense from 1911 to 1914 indicates

that such expenses are composed in part of operating expenses and in part of stock issuance expenses and that Petitioners are unable to identify same. (page 77)

184. That the promotion expenses claimed by Petitioners in the amount of $29,601.59 should not be included in Petitioners' rate base. (page 77)

185. That the costs claimed by Petitioners for the preparation of a map for Moody's manual are not proper capital expense. (page 77)

186. That the land below Cully's Falls should never have been included in plant account. (page 79)

187. That Petitioners assumed that after 1905 more than a majority of the rights and interests acquired under the Harlow-McGaw contract were retained. (page 79)

188. That Petitioners' assumption that after 1905 a majority of the rights and interests acquired under the Harlow-McGaw contract were retained is not substantiated by the evidence. (page 79)

189. That the $200,000 is the best evidence of the proper credit to Penn Water's plant account. (page 79)

190. That it is improper for Petitioners to credit plant account with the amount of $162,936.02 instead of $200,000. (pages 77-79)

191. That considerably more than a half of the rights and interests retained up to 1930 by Penn Water, out of the original Harlow-McGaw properties, were transferred to Safe Harbor. (page 80)

192. That the adjustment contended for by Petitioners in the amount of $119,940.20 should not be made in determining Petitioners' cost or rate base. (page 80)

193. That Petitioners' plant accounts indicated that the original cost of the Harlow-McGaw properties was $379,824. (page 80)

194. That the Harlow-McGaw properties were divided so that 11.68 miles of canal and 117 acres were transferred to Safe Harbor, and 8.32 miles and 28 acres were retained by Penn Water. (page 80)

195. That Petitioners as of September 1912 had gotten very satisfactory results from the use of the flashboards. (page 81)

196. That except for the change from solid supporting pins to seamless tube supporting pins, the same flashboard system in use in 1912 is now in use. (page 82)

197. That the flashboard expense incurred by Petitioners during the period 1911-1912 adequately covered the original cost of installing a system adequate to provide for the additional storage of water required. (page 82)

198. That all of the other claimed expenditures of Petitioners relate to either improvements in operations or to experimental improvements tried and abandoned without having been put to permanent use. (page 82)

199. That the expenditures here in issue in the amount of $49,754.97 are not proper cost of plant and are not properly includible in Petitioners' rate base. (page 82)

200. That from March 1916 to and including 1924 only a part of the acquisitions were concerned with flowage rights and a significant number of those arose out of previous litigation. (page 84)

201. That Petitioners implied by their evidence that a reasonably complete identification of expenses connected with such other matters could not be made and could not be segregated. (page 84)

202. That many of these other duties clearly related to operations and expenses relating thereto and are improper items to capitalize. (page 84)

203. That there is insufficient evidence upon which to make a segregation of allowable items of expense after March 16, 1916. (page 84)

204. That none of the services can be identified with any particular property and further no properties were acquired from April 1916 to July 1920 except for foreclosure in 1919 with respect to a single property. (page 85)

205. That Petitioners are unable to state the basis used for the determination or apportionment of fees and the inclusion thereof in plant is unjustified on the record in this proceeding. (page 85)

206. That Petitioners charged the amount of $45,325.71 and $561.65 to the Flowage Basin sub-accounts without explanation of the work done. (page 85)

207. That Petitioners did not relate the engineering work set forth in the field notes and drawings to any specific charges in Flowage Basin accounts. (page 86)

208. That the items of cost (referred to by the Commission on page 86 of the Opinion) are ordinary operating expenses. (page 86)

209. That the cost of such surveys (described on page 86 of the Opinion) have been segregated in another Flowage Basin sub-account entitled "Surveying Property" which the Commission has allowed in full. (page 86)

210. That there was no evidence that the costs of property surveys were improperly classified at the time of the cost distribution. (page 86)

211. That Petitioners' reclassification of costs was unsupported by evidence. (page 86)

212. That the inclusion in plant account of $45,325.71 and $561.65 is not justified. (page 87)

213. That the item in the amount of $4,988.45 for river observations is subject to the Commission's general conclusions applicable to the consideration of similar functions set forth in connection with Petitioners' contentions relating to office engineering expense. (page 87)

214. That because of the character of the Lancaster office after 1925 as an office having a minor relation to any sort of project cost work and as Petitioners have failed to present any evidence enabling determination of any item of Lancaster office expense as proper for capitalization none of the amount of $20,787.41 can be included in plant. (page 88)

215. That there is no evidence that the charges in the account, survey of storage reservoir sites, represented the establishment of gauges for the determination of river flow. (page 88)

216. That during the period 1926 to 1930 only one new property was acquired by Petitioners and there was only one flooding or flashboard suit. (page 88)

217. That Staff witness Newlands' failure to find in Petitioners' accounts, records and files, supporting data is an indication that the amount of $12,420.77 should not be allowed as proper capital cost. (page 89)

218. That the evidence shows that Mr. Bennett was engaged from 1909 to 1911 in a continuing investigation of probable sites for the storage of water on the tributaries of the Susquehanna River and in obtaining data for use before the state legislature. (page 89)

219. That such work continued at least late into 1911. (page 89)

220. That Petitioners have not established the propriety of the inclusion of $12,420.77 in their rate base. (page 90)

221. That the transaction concerning the cost of land acquired from the Baltimore Electro Alloys Company is one involving a profit between affiliates. (pages 90, 91)

222. That the amount of $24,151.83 consists of a write-up and is not properly includible in plant account or in the rate base. (page 91)

223. That the action at law added nothing to the value of the property as subsequently acquired and the original accounting with respect to the cost of defending title was correct. (page 91)

224. That the amount of $1,427.42 should not be included as part of Petitioners' rate base. (page 91)

225. That Petitioners contend that the sum of $39,301.46 should be included as part of the rate base because it is identified with an agreement relating to the adjustment of interests in connection with the construction of a downstream hydro plant and embraces the cost of the study made as to the anticipated effect of the downstream development on Penn Water's hydro operations as well as a fee for legal services and certain travel expenses with respect thereto. (pages 91, 92)

226. That the facts are that the agreement of February, 1926 does not settle title claims, as both parties thereto explicitly save their contentions and the proceeding is merely stayed. (page 93)

227. That the sum of $39,301.46 is an expense relating to operations. (page 93)

228. That the item of $39,301.46 should not be included in the rate base because such a long time has elapsed since said item was incurred. (page 93)

229. That Petitioners abandoned the project concerning the construction of a transmission line from Holtwood to Lancaster, Pennsylvania or allowed the options to expire. (page 94)

230. That because Petitioners acquired no property or facilities as a result of the expenditure of the sum of $12,459.23 the same is not a proper one for inclusion in plant or rate base of petitioners. (page 94)

231. That the amount of $5,668.48 should not be included in Petitioners' rate base because Petitioners

acquired no property and possessed nothing with which "cost" can be associated. (page 95)

232. That Petitioners have no supporting detail other than the testified to possibility that most of the spoilage in cement occurred during the cessation period. (page 95)

233. That Staff witness Newlands' testimony indicates that the item of $13,033.04 should be eliminated from Petitioners' rate base. (page 96).

234. That a physical inventory in 1908 showed a total of 35,736 barrels of good cement on hand, the cost price of which amounted to $51,653, and that of this old cement the receiver used only 7,852 barrels and Petitioners a further 8,626 barrels, leaving a balance of 19,258 barrels unaccounted for. (page 96)

235. That there was no evidence that the remaining barrels of old cement were ever used in construction or that contemporary correspondence and Staff testimony indicates that such cement was on hand but had spoiled. (page 96)

236. That the record supports the conclusion the $13,033.04 should be eliminated from Petitioners' rate base. (page 96)

237. That Petitioners' proposal to include the sum of $13,033.04 in its rate base as proper original cost is not approved. (page 96)

238. That the loss of $130.99 cannot on the evidence in this proceeding be associated with the cost of constructing the project. (pages 96, 97)

239. That no justification has been shown for including the amount of $130.99 in Petitioners' rate base. (pages 96, 97)

240. That the Susquehanna Contracting Company is described in the evidence as a "paper" company. (page 97)

241. That the administrative expenses of the Susquehanna Contracting Company could at best only be regarded as financing costs. (page 97)

242. That the amount of $6,621.85 is not allowable as a part of the rate base in view of the 6% interest allowance hereinbefore made. (pages 97, 98)

243. That there is no indication that the fee of $50,194.73 represents the distribution of the time of supervisory employees named by Petitioners witness Gunn as being those whose services were involved in connection with said fee. (page 99)

244. That it is clear from the evidence that the fee of $50,194.73 constituted a profit between affiliates and that the amount thereof should not be included in investment in electric plant by Petitioners. (page 99)

245. That Petitioners witness Gunn did not know how the fee of $50,194.73 was determined. (page 99)

246. That Petitioners had no records of the time, services or salaries allocated to the Steam Plant. (page 99)

247. That Petitioners witness Gisiger testified that Petitioners' engineers made only minor modifications in the plans for the design of the Steam Plant. (page 99)

248. That the Staff showed that Holtwood Power Company was in fact solely organized by Penn Water's lawyers. (page 100)

249. That the activities of Mr. Bushong and the Lancaster office constituted incidental part time work of a clerical nature. (page 100)

250. That uncontested expenses allowed by the Commission and its Staff contain ample provision for organization expense of the Holtwood Power Company. (page 100)

251. That Mr. Bushong's services were of an incidental nature in organizing Holtwood Power Company and should not be capitalized. (page 101)

252. That Petitioners have failed to identify or explain the items for office salaries and expenses or those for salaries and traveling as relating to the organization of Holtwood Power Company. (page 101)

253. That Petitioners witness Gunn did not know the nature of Mr. Zimmerman's services. (page 101)

254. That Petitioners have made no showing that all of the attorney's services were rendered in connection with the organization of Holtwood Power Company or what portion of such services related thereto. (page 101)

255. That inclusion in Petitioners' rate base of the amount of $17,875.34 would be improper. (page 101)

256. That work on the tower foundations was ordered commenced solely to take advantage of the availability of a competent construction force in the vicinity at the time. (page 101)

257. That the expense of $3,595.95 relates to abandoned work and is improperly included in Petitioners' rate base. (page 102)

258. That Petitioners proposal to include in their rate base the sum of $96,116.84 represents reaccounting for expenditures. (page 102)

259. That except for one minor item all these items here proposed for correction relate to necessary repair and maintenance work involving individual parts of equipment or structures. (page 103)

260. That Staff witness Newlands' opinion that the items of betterment had been properly treated as repair and maintenance items by Petitioners at the time

they were incurred according to then accepted accounting practice indicates that said items were not betterments but were repair and maintenance items. (page 103)

261. That Petitioners witness Eichhorn stated that it was a matter of judgment in determining whether the items in question were maintenance and repair or betterments. (page 103)

262. That Petitioners' proposal to adjust the entries of $14,813.34 and $11,339.99 respectively amount to reaccounting and said sums should not be included in the rate base. (page 102)

263. That Petitioners witness Wetzel testified that a determination of whether particular items represented an addition or maintenance and repair involved the exercise of discretion and judgment. (page 103)

264. That Petitioners' original accounting of the items of betterments was done under or pursuant to the state commission's system of accounts then prescribed. (page 103)

265. That Staff witness Newlands' testimony that Petitioners' original entries as to the additions made on their books represented accepted accounting practice at the time of entry indicates that said entries were in accord with proper accounting practice at the time. (page 104)

266. That the items of additions were properly treated at the time of the original accounting as repairs and maintenance and that what Petitioners are proposing merely amounts to reaccounting. (page 104)

267. That the proposed items of additions should not be included in Petitioners' rate base. (page 104)

268. That Petitioners' proposals as to items of replacements amount to reaccounting. (page 104)

269. That it was established by the evidence that the classification as a replacement as distinct from maintenance or repair rests upon judgment. (page 104)

270. That the original accounting as to replacements had been pursuant to or in accord with a system promulgated by the Pennsylvania Commission. (page 104)

271. That Petitioners' original recording of the items of replacements was pursuant to accepted accounting practice at the time, did not constitute error, and reaccounting therefore at this time would be improper. (page 104)

272. That the Petitioners' proposed credit in the amount of $27,539.98 should not be permitted in connection with the determination of the Petitioners' rate base. (page 105)

273. That overheads in the amount of $50,000 should not be included or allowed herein. (page 105)

274. That the amount of $27,539.98 should not be treated as part of the cost of plant retired. (page 105)

275. That Petitioners' proposed credit of $27,539.98 should be eliminated. (page 105)

276. That Petitioners' donation of $1,400 to the construction of the Holtwood church was properly an income or surplus charge and not a proper capital charge. (page 105)

277. That $6,132.41 representing "river coal investigation expense" was a non-utility expense and is not a proper part of Petitioners' rate base. (page 106)

278. That the expenses of $1,340.98, $2,291 43 relate to Penn Water's non-utility business and should not be included in the rate base. (pages 106, 107)

279. That Petitioners' claimed original cost should be reduced by $3,191,704.23. (page 108)

280. That the amount of $75,722.25 representing the book cost of real estate held for possible future use should not be included in the rate base. (page 108)

281. That "the following adjustments are appropriate for disposing of the improper or incorrectly classified items as recorded on the books at December 31, 1945, totaling $5,400,606.31". (page 109)

282. That neither the specific location of the future development, nor the design, nor the date of the commencement of construction thereof has yet been determined, nor, in fact, can this development be used as a part of the Holtwood project and may not even be owned by Penn Water. (page 111)

283. That it has not been decided when construction will begin on these lines and no contract has been closed with the customer requiring their construction. (page 111)

284. That according to the evidence it is proper to allow as a part of the rate base only those of the foregoing items which are included in the power bill and the remaining items claimed are not to be included in the rate base. (page 111)

285. That the date when the proposed new Lancaster transmission line is to be built is undetermined. (page 112)

286. That there are no definite plans as to the date of the use of rights of way paralleling existing lines of Petitioners. (page 112)

287. That such items relate to matters which are too indefinite to justify consideration of the related amounts as a part of Petitioners' rate base. (page 112)

288. That on the basis of the evidence and the findings of facts and conclusions of law in the opinion the consolidated net investment rate base for Petitioners for

the year 1946 is as set forth on page 131 of the Opinion. (page 131)

289. That the total investment rate base for Petitioners for the year 1945 is $33,140,022 and for the year 1946 $33,113,148. (page 131)

290. That the average investment rate base for Petitioners for the year 1946 is $33,126,585. (page 131)

291. That the average net investment of Petitioners for the year 1946 is $24,124,712. (page 131)

292. That Petitioners' net investment rate base for the year 1946 is $24,774,712. (page 131)

(63) Petitioners herein object to and seek rehearing of Opinion No. 173 of the Commission because of its failure to find the following facts and make the following conclusions of law. Said failure to find the following facts being contrary to the substantial evidence in the record and the failure to determine the following conclusions of law being contrary to law and the Federal Power Act and resulting in depriving Petitioners of their property without due process of law:

1. That Staff witness Newlands was unqualified as a witness and his testimony should be rejected.

2. That Commission Staff had no independent evidence as to any of the disputed original cost items and simply limited itself to endeavoring to pick flaws in the positive evidence of Petitioners.

3. That the Staff failed to introduce on the subject of original cost a witness who had the proper engineering, valuation, investment or legal knowledge necessary to support his conclusions.

4. That it was proper for Petitioners to value the common and preferred stock of the McCall Company on the basis of property received and services rendered therefor.

5. That Petitioners' claim that original cost arising out of the stock of McCall Company amounts to $1,031,273.46, represents proper capital cost and should be included in Petitioners' rate base.

6. That purchasers of McCall Company bonds paid $900 for a $1,000 bond with either $450 or $500 par value of preferred stock.

7. That Petitioners accurately proved the distribution of the McCall Company stock to Bertron, Storrs & Griscom; Harvey Fisk & Sons; Mr. Hutchinson; Lee, Higginson & Co., and Coudert Bros.

8. That the banking firm of Bertron, Storrs & Griscom received McCall Company common stock in return for banking services rendered.

9. That Harvey Fisk and Sons and Cary T. Hutchinson received 17,537½ and 18,840 shares respectively of McCall Company common stock in return for services rendered and property conveyed.

10. That of the total shares of the common stock issued, 18,840 shares having a cash value of $471,000 went to Mr. Hutchinson as part consideration for the purchase of his land, water rights, engineering and legal investigations, etc.; of the balance 1,150 shares having a cash value of $28,750 were transferred to other individuals as part consideration for land and water rights owned by them. Of the remaining, 10 shares having a cash value of $250 were issued to incorporators. All of the foregoing total $500,000 which is proper original cost and should be included in Petitioners' rate base.

11. That the affidavits of Messrs. Fisk, Hutchinson, Lee, Hopkins and Aldred were made after lengthy consideration of the facts by each and are of controlling weight in determining the facts stated therein.

12. That Mr. Griscom of the firm of Bertron, Storrs & Griscom stated the stock of McCall Company had value.

13. That Petitioners witness Gunn furnished adequate documentary evidence to Messrs. Fisk and Hutchinson for their consideration long prior to the date of their affidavits.

14. That Mr. Hutchinson's receipt of 18,840 shares of common stock of McCall Company was not inconsistent with the agreement of June 14, 1905.

15. That the stock paid to Mr. Hutchinson was for land, water rights and services rendered and represented no profit to him.

16. That Mr. Hutchinson transferred more than 2,896.54 acres of land and water rights to the McCall Company in return for the cash and stock paid to [redacted].

17. That it is improper to compare the land and water rights transferred by Mr. Hutchinson to the McCall Company on an acreage basis.

18. That the common and preferred stock issued to Harvey Fisk & Sons; Lee, Higginson & Co., and Bertron, Storrs & Griscom was for services rendered.

19. That Staff witness Newlands admitted he knew nothing about the distribution of McCall Company stock.

20. That the McCall Company common stock had a cash value of $25.00 per share and the preferred stock of $50.00 per share at the time it was accepted by Messrs. Fisk and Hutchinson, and Lee, Higginson & Co.; Bertron, Storrs & Griscom; Harlow-McGaw and Pullen in return for services rendered and property conveyed.

21. That aside from a value created by actual buying and selling on the market, the value of stock depends upon the value of the net corporate assets behind it.

22. That Petitioners witness Uhl properly valued the land and water rights received by McCall Company at $3,300,000.

23. That Petitioners witness Uhl's valuation clearly supports Petitioners' claimed value of $25.00 and $50.00 per share for the common and preferred stock of McCall Company.

24. That Mr. Hutchinson's and Petitioners witness Uhl's valuations of the McCall Company stock were not based upon a capitalization of prospective earnings.

25. That prospective earnings afford a proper element for valuing stock if they are considered by a person who actually traded in the stock at the time in question.

26. That Petitioners witness Uhl valued the land and water rights in question by considering the value of other similar lands and water rights necessary for the construction and operation of other similar hydroelectric projects which method is followed by all reputable real estate experts in valuing property.

27. That Petitioners witness Uhl's valuation has no relation whatever to capitalization of earnings but is based upon the expert judgment of this witness who has had a lifetime of experience in valuing for the purpose of purchase and sale of land and water rights for hydroelectric use.

28. That the affidavits of Messrs. Hutchinson, Fisk, Lee, Hopkins and Aldred are entitled to conclusive weight in respect to the facts therein contained.

29. That Mr. Lee was prevented from testifying in this case because of his age and physical condition.

30. That the evidence relied upon by the Commission in refusing to allow a cash value for the McCall Company stock is entirely circumstantial and equally supports either of two or more opposed or inconsistent infer-

ences and cannot of itself be deemed to furnish support for one of such inferences to the exclusion of the other.

31. That the transaction between Mr. Hutchinson and McCall Ferry Power Company pursuant to which Mr. Hutchinson conveyed land and water rights to the McCall Ferry Power Company was an arm's-length transaction.

32. That Mr. Hutchinson received no profit in the transaction pursuant to which he conveyed land and water rights to the McCall Ferry Power Company.

33. That the banking firm of Harvey Fisk & Sons dominated the McCall Ferry enterprise from the time of that firm's first connection with said enterprise to the exclusion of all other interested persons.

34. That there was no substantial evidence in the record to support the conclusion that the stock of the McCall Company was not worth $25.00 and $50.00 per share for the common and preferred respectively at the time Petitioners claimed a value therefor.

35. That at March 1905 the value of McCall Company securities agreed to be issued amounted to $10,764,375.00 and things of value supporting their cash value amounted to $10,554,750.00.

36. That Petitioners are entitled to capitalize the cost of the common and preferred stock of the McCall Company at $25.00 and $50.00 per share respectively whereever this stock was given or exchanged for properties or services received.

37. That the banking firm of Harvey Fisk & Sons performed management services for the McCall Company and that it is proper for Petitioners to capitalize $199,570.31 as representing three-eighths of the total value of the common and preferred stock at $25.00 and $50.00 respectively of the McCall Ferry Power Company received

by Harvey Fisk & Sons as compensation for both management and banking services.

38. That the firm of Harvey Fisk & Sons performed essential management services contributing to the McCall Company enterprise.

39. That pursuant to the agreement between Mr. Aldred and the Bondholders Committee, Mr. Aldred was to finance and manage the project and receive a total of 35,000 shares of common stock of which 5,000 shares were to be compensation for management services.

40. That Mr. Aldred in fact rendered management services to the enterprise and was entitled to receive 5,000 shares of stock as compensation therefor.

41. That said 5,000 shares of stock of Penn Water which Mr. Aldred received as compensation for his management services represented proper cost to the extent of $60.00 per share for the portion applicable to the construction period and was the result of an arm's-length transaction.

42. That Petitioners are entitled to capitalize $218,750.00 as representing payment to Mr. Aldred for management services performed by him for the development from November 1, 1908 to October 1, 1911.

43. That Petitioners are entitled to capitalize and include in their rate base $331,703.15 of McCall Company bond issuance expense as Penn Water stock issuance expense.

44. That Petitioners are entitled to capitalize and include in their rate base $81,906.59 of stock issuance expense incurred for the issuance of Penn Water's capital stock from 1923 to 1935.

45. That the Interstate Commerce Commission Classification of Investment in Road and Equipment of Steam Roads attached to and made a part of the Federal

Power Commission Uniform System of Accounts, Account 71, requires the inclusion in plant account of the items of $31,703.15 and $81,906.59.

46. That Petitioners are entitled to capitalize and include in their rate base interest during construction or accumulated Construction balances for the period November 1, 1907 to September 1, 1909 at 6% per annum.

47. That there was no mismanagement or lack of due diligence on the part of representatives of McCall Ferry Power Company in securing finances for the continuation of construction.

48. That representatives of McCall Company made timely arrangements to secure additional funds necessary to continue construction but the financial panic of 1907 prevented the securing of these funds.

49. That at the time of the occurrence of the financial panic of 1907 funds were available to carry on the project to the end of the year but the McCall Company representatives were prevented from securing these funds as a result of said panic.

50. That the financial panic of 1907 prevented McCall Company from securing additional capital theretofore arranged for and temporarily tied up funds from the original financing due to the failure of the Knickerbocker Trust Company and was the factor which accounted for the so-called cessation period.

51. That the management of McCall Ferry Power Company is presumed to have acted properly and without negligence until the contrary is established by competent evidence and there was no evidence indicating that management failed to act with due diligence.

52. That there was work of a substantial nature done during the cessation period and said work contributed to the expeditious completion of the development.

53. That the initial development was not in commercial operation until October 1, 1911.

54. That during the construction period all costs are proper and must be allowed unless there is a showing of lack of due diligence on the part of management responsible for the construction work.

55. That at the close of the construction period reliable commercial operation is considered to begin when (1) construction is substantially complete, all major work contemplated for the time done, (2) the power units and related property have been generating and transmitting for a sufficient time to iron out operating difficulties and mistakes in setting up and (3) they have been delivering steady power long enough that further unexpected stoppage is improbable.

56. That commercial operation begins when in the course of due diligence the project has been sufficiently completed to be reasonably reliable and available for service. Not merely its technical physical functioning but the nature of the use for which it is designed and its adequacy to meet the burdens ~~such use~~ entails are factors to be considered.

57. That the initial development consisted of 50,000 hp. accomplished by the installation of 5 units.

58. That no portion of the construction period should be deleted in computing interest during construction unless a rate of interest greater than 6% is used.

59. That Petitioners are entitled to capitalize and include in their rate base the amount of $1,008,579.57, which has been eliminated by the Commission, as proper interest during construction.

60. That the capitalization of administrative and other overhead expenses by Petitioners during "Cessation Period" amounting to $52,899.52 is proper, and said

items represent proper original cost and should be included in Petitioners' rate base.

61. That costs totalling $36,445.21 incurred during the cessation period are proper capital costs and Petitioners are entitled to include them as a part of the rate base.

62. That the cessation account expenses totalling $36,445.21 contributed to the completion of the project and are proper original costs.

63. That engineering salaries and fees totalling $54,636.73 are proper capital items and Petitioners are entitled to include them in their rate base.

64. That Petitioners have properly determined the nature of the promotion expenses in the amount of $29,691.59 and the said expenses are properly includible in Petitioners' rate base.

65. That Petitioners are entitled to correct their books of account by charging $37,063.98 to plant account.

66. That the sale price of the bonds and stocks of Susquehanna Power and Susquehanna Properties Companies in 1912 is not evidence as to their value in 1908.

67. That the proper original cost of the lands acquired by McCall Company from Harlow-McGaw and Willson and Witmer was $119,940.20 less than the fair value thereof as found by the Commission in 1930.

68. That Petitioners can properly transfer the amount of $119,940.20 from electric plant land account to surplus.

69. That it was proper for Petitioners to capitalize the amount of $49,754.97 as representing proper experimental costs incurred from 1913 to 1921 in connection with the perfecting of a system of flashboards to be used on the crest of the dam for the purpose of providing

additional head which in turn, would permit the generation of additional electricity.

70. That experiments in the use of flashboards properly covered the period from 1911 to 1921 before the use of said flashboards had been substantially perfected and Petitioners' costs as to this experimental period are a proper part of their rate base.

71. That it was proper for Petitioners to capitalize and include in their rate base the sum of $209,134.30 representing proper acquisition costs, cost of establishing gauges, cost of property acquired from the Baltimore Electro Alloys Company and acquisition costs of property described as the Boyd Mill tract.

72. That acquisition expenses and necessary legal and engineering services totalling $171,134.28 represent proper, original cost and are properly includible in Petitioners' rate base.

73. That Petitioners have identified the items in connection with the acquisition expenses and necessary legal and engineering studies in the amount of $171,134.28.

74. That the amount of $12,420.77 is a proper capital item and is properly includible in Petitioners' rate base. Said amount relates to the establishment of gauges up river from the Holtwood pond.

75. That the item of $24,151.83 represents the cost of property acquired by Petitioners from the Baltimore Electro Alloys Company and is a proper item to be included as original cost in Petitioners' rate base.

76. That the property acquired by Petitioners from Baltimore Electro Alloys Company was first devoted to public service when acquired by Petitioners.

77. That the meaning of the phrase "devoted to public service" is the setting aside for public use.

78. That the item of $1,427.42 represents expenses in defense of title to land described as the Boyd Mill tract charged in error to operating expenses when incurred and is properly includible by Petitioners in their rate base.

79. That every expenditure made by Petitioners must be assumed to have been made with the exercise of sound reasonable judgment unless the contrary is shown by the evidence and the contrary has not been shown by the evidence in this case.

80. That Petitioners witness Bortner was on several occasions offered for cross-examination at the hearing and counsel for the Commission refused to cross-examine this witness.

81. The amount of $39,301.46 properly represents legal and engineering fees incurred by Petitioners in defending their title to land and water rights located below the dam and powerhouse.

82. That the amount of $39,301.46 represents proper original cost and should be allowed in Petitioners' rate base.

83. That the amounts of $12,459.23 and $5,668.48 represent costs incurred by Petitioners in connection with the construction of a transmission line from Holtwood to Lancaster, Pennsylvania, and the construction of the Takoma Park Substation, both of which facilities are used in rendering service to the public.

84. That the amounts of $12,459.23 and $5,668.48 are properly includible in Petitioners' rate base.

85. That unless Petitioners are permitted to include the amounts of $12,459.23 and $5,668.48 in their rate base as proper original cost the consumers will enjoy the benefits arising from the use of property without payment of any kind therefor.

86. That the amount of $13,033.04 represents materials and supplies unaccounted for during construction

and is a proper capital item and properly includible in Petitioners' rate base.

87. That the amount of $130.99 represents cash unaccounted for during the construction period and is a proper item of original cost to be included in Petitioners' rate base.

88. That the item of $6,621.85 properly includes miscellaneous administrative expenses, including legal fees, New York City and state taxes, salaries, printing and stationery, etc. incurred in the formation, operation and dissolution of the Susquehanna Contracting Company.

89. That the item of $6,621.85 represents proper original cost and is properly includible in Petitioners' rate base.

90. That $50,194.73 represents the cost of supervisory engineering services furnished by Petitioners during the years 1922 to 1924 in the construction of the Holtwood Power Company steam station and represents proper original cost and is properly includible in the Petitioners' rate base.

91. That $17,875.34 represents money expended for legal fees and supervisory expenses in connection with the formation of Holtwood Power Co. and is properly includible in Petitioners' rate base.

92. That the item of $3,595.95 represents expenditures incurred by Petitioners in the construction of unused tower foundations and is proper original cost and properly included in Petitioners' rate base.

93. That the Commission cannot substitute its judgment for that of management.

94. That $96,116.84 represents physical items of property which were originally charged in error to operating expenses or depreciation reserve on Petitioners'

books and the Commission is without power to prevent Petitioners from correcting their books to accurately reflect the cost of their property.

95. That the sum of $96,116.84 represents proper original cost and is properly includible in Petitioners' rate base.

96. That $1,400.00 represents a contribution by Petitioners to the trustees of the Holtwood Presbyterian Church for the purpose of assisting said trustees to construct a church on land owned by Petitioners and represents proper original cost and should be included in Petitioners' rate base.

97. That $6,132.41 represents the cost of experiments made by Petitioners to determine the question of the economy of using river coal for steam generation of electricity, represents proper original costs and should be included in the Petitioners' rate base.

98. That $77,918.28 represents the amount of property held by Petitioners for future use and is properly includible in Petitioners' rate base as proper original cost.

99. That the sum of $237,361.79 represents construction work in progress and is properly includible in Petitioners' rate base as of December 31, 1945.

100. That the undisputed amount of construction work in progress as of December 31, 1945 which was in service as of December 31, 1946 was $110,676.08.

101. That there is no duplication in connection with the inclusion by Petitioners of uncompleted construction work in progress in the rate base because Petitioners have not capitalized interest on any of the jobs in progress amounting to $126,685.71.

102. That where the use to which property is to be put is definite and the time of use is specified it should be included in the rate base as property held for future use.

103. That Petitioners are entitled to capitalize a total of $3,476,859.81, disallowed by the Commission, as representing proper original cost and said amount is properly includible in their rate base.

104. That the rate base of Petitioners as computed and determined by the Commission is less than the "net investment" of the Petitioners in their project as the term "net investment" is defined in Section 3 (13) of Part I of the Federal Power Act.

105. That the Petitioners' rate base as computed by the Commission has not been determined in accordance with the terms and provisions of the Federal Power Act but in violation thereof.

106. That the term "net investment" as defined in Section 3 (13) of the Act means "the actual legitimate original cost thereof (the project) as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created." The term "net investment" as used by the Commission in its Opinion and its "Order Reducing Rates" is not "net investment" as defined in Section 3 (13) of the Federal Power Act.

107. That there is no evidence upon which the Commission could find that any deduction of depreciation reserve, or other deduction, should be made in the determination of net investment in Petitioners' property.

(64) Petitioners herein object to and seek rehearing of the following portions of the Commission's Opinion No. 173 relating to depreciation and net investment in Petitioners' property; on the grounds that the Commission erroneously decided each and all of the following statements, matters, findings and conclusions of law and erred with respect thereto in that said statements, matters, findings and conclusions of law are not supported by substantial evidence, are contrary to the substantial evidence, contrary to law, the Federal Power Act and deprive Petitioners of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States:

1. That Petitioners contend that accrued depreciation in their properties at the end of 1945 amounted to $6,000,000. (page 113)

2. That Petitioners' method of determining actual depreciation was largely by the observation process. (page 113)

3. That the Staff estimated accrued depreciation on the age-life straight-line basis. (page 113)

4. That the Staff made an estimate of the service lives of the various classes of plant of Petitioners. (page 113)

5. That the Staff made a proper computation of depreciation reserve or reserve requirement. (page 113)

6. That the Staff's method of determining depreciation reserve or the reserve requirement represents the proper measure of determining accrued depreciation. (page 113)

7. That the agreement in total by Petitioners witnesses Gunn and Uhl should not be construed as an agreement as to details or to procedures. (page 114)

8. That it was only by the sheerest of coincidences that the determination of Petitioners witnesses

Uhl and Gunn approximated one another so closely. (page 114)

9. That the Petitioners witnesses Gunn and Uhl disagreed in major respects. (page 114)

10. That over 50% of Petitioners witness Gunn's estimate for depreciation in accessory electric equipment represented obsolescence whereas only 15% of Petitioners witness Uhl's estimate came within that category. (page 114)

11. That Petitioners witness Gunn stated that he did not use service lives as in his opinion the results obtained thereby would bear no relation to existing depreciation except by coincidence, even if a series of adjustments were made from time to time until life expired. (page 115)

12. That Petitioners witness Gunn was very uncertain and indefinite as to what weight he gave to a time discount factor. (page 115)

13. That Petitioners witness Gunn's use of a time discount factor apparently related to a consideration of life expectancy over a possible range of years. (page 115)

14. That Petitioners witness Gunn assumed that depreciation in Petitioners' property would proceed at a certain rate. (page 115)

15. That Petitioners witness Gunn stated he could not make an accurate determination of depreciation without the use of a time discount factor. (page 115)

16. That Petitioners witness Gunn's determination of economic disadvantage produced a result dependent upon price levels through the effect of prices on current operating expenses of existing property and assumed operating expenses and capital costs of alternative

17. That all of Petitioners witness Gunn's studies as to depreciation involved the exercise of judgment without factual basis. (pages 115, 116)

18. That Petitioners witness Gunn speculated as to what would be the cost of building and operating substitute plants. (page 116)

19. That Petitioners witness Gunn obtained carrying charges by use of a factor developed twenty years ago which he did not check for adaptability for current use and which contained an element of return not appropriate in this proceeding, and an element of depreciation in no way related to his own method of determining depreciation. (page 116)

20. That Petitioners witness Gunn's studies contained supposititious operating and maintenance savings. (page 116)

21. That Petitioners witness Gunn assumed a value of power and energy losses that might be saved by modernization of substations. (page 116)

22. That the studies or testimony of Petitioners witness Gunn had "all of the speculation and faults of reproduction new". (page 116)

23. That Petitioners witness Gunn's judgment of depreciation is compromised by the use of a vaguely defined and vaguely used time discount factor. (page 116)

24. That Petitioners witness Gunn's determinations are too speculative to be of real assistance to the Commission in determining accrued depreciation. (page 116)

25. That Petitioners witness Uhl's determination of depreciation actually represented only deferred maintenance. (page 116)

26. That Petitioners witnesses Gunn and Uhl used essentials of a service life calculation to obtain an estimate of the deferred maintenance and depreciation. (page 117)

27. That Petitioners witness Uhl gave no real consideration to obsolescence. (page 117)

28. That it is nowhere apparent in the evidence what consideration Petitioners witness Uhl gave to depreciation existing due to deterioration that could not be found by visual examination. (pages 117, 118)

29. That it is obvious that Petitioners witness Uhl gave principal consideration and weight to the physical condition of the property as he found it. (page 118)

30. That both Petitioners witnesses, Gunn and Uhl, determined their so-called actual depreciation by the observation process. (page 118)

31. That Petitioners witness Gunn endeavored to create the impression that his was a scientific study through generalizations and technical descriptions. (page 118)

32. That Petitioners witness Gunn stated that the $1,500,000 was merely a provision for some kind of contingency in the future. (page 118)

33. That Petitioners method of determining depreciation was "observed depreciation". (page 118)

34. That prior decisions of the Commission are an indication that Petitioners' method of determining depreciation is unlawful or improper. (page 118)

35. That the record in this case shows that Petitioners' method of determining depreciation cannot be accepted as a measure of accrued depreciation for rate base purposes. (page 118)

36. That the decision in the Safe Harbor Water Power Corporation case indicates in some way that

Petitioners' method of determining depreciation in this case is unlawful or improper. (page 118)

37. That the Safe Harbor Water Power Corporation case decided by this Commission is a precedent for this case. (page 118)

38. That the Safe Harbor Water Power Corporation case heretofore decided by this Commission correctly decides the issues therein determined. (page 118)

39. That Petitioners witnesses determined depreciation in Petitioners' property wholly by visual inspection. (page 118)

40. That Commission Staff determined accrued depreciation. (page 119)

41. That Petitioners have employed a method in computing annual depreciation expense similar to the Staff's method of determining accrued depreciation by the use of straight-line, age-life method in this case. (page 119)

42. That since 1931 amounts of depreciation expense accrued in Petitioners' books have been collected from customers. (page 119)

43. That most of Petitioners' reserve was built up by accruals for which Petitioners were specifically reimbursed under the purported Agreement of June 1, 1931. (page 119)

44. That Petitioners' use of service lives in computing annual depreciation expense for accounting purposes is evidence in and of itself of the existence of actual depreciation. (page 119)

45. That Commission Staff properly determined service lives of the various units or classes of Petitioners' property. (page 119)

46. That Commission Staff witnesses estimated service lives. (page 119)

47. That Commission Staff witnesses made a field examination or study of Petitioners' operation, inspection, maintenance and trouble reports in considering functional (economic) as well as physical causes of plant retirement. (page 119)

48. That Petitioners did not offer any evidence in respect to service lives. (page 119)

49. That the service life assumptions (estimates) of the Staff are reasonable and that they should be approved. (page 119)

50. That the Commission or its Staff made a determination of service lives. (page 119)

51. That the Commission Staff witnesses made a proper determination of depreciation reserve (reserve requirement). (page 119)

52. That the reserve requirement assumed (estimated) by Commission Staff witnesses represented that part of the service life of Petitioners' property which had expired or in other words, which related to the past. (pages 119, 120)

53. That Commission Staff witnesses' method of determining depreciation reserve was substantially the same as that employed by Petitioners in their accounts since they inaugurated depreciation accounting. (page 120)

54. That a method of accounting for depreciation in and of itself is evidence of depreciation. (page 120)

55. That the Staff of the Commission properly determined Petitioners' reserve requirement as of December 31, 1945 in the amount of $8,408,373. (page 120)

56. That the book reserve of Petitioners was somewhat higher than the reserve requirement. (page 120)

57. That the difference between Petitioners' book reserve and actual depreciation is represented by the fact that the book reserve contains allowances for resurfacing the dam and a few other deferred maintenance items not included in the Staff's estimates. (page 120)

58. That it is now well established that depreciation expense and accrued depreciation should be determined by the same method in order to do justice to rate payers and the company alike. (page 120)

59. That Petitioners used dual standards in determining accrued depreciation or depreciation expense which inevitably resulted in injustice. (page 120)

60. That Petitioners' method of determining depreciation was by "observed depreciation". (page 120)

61. That the straight-line method is now the generally accepted method of computing actual depreciation. (page 120)

62. That the issues in the Safe Harbor case are the same as the issues in this case. (page 120)

63. That the Safe Harbor case heretofore decided by the Commission properly decides the issues contained therein. (page 120)

64. That the procedure of the Commission Staff in determining depreciation expense and accrued depreciation conformed to a well established precedent. (page 120)

65. That Petitioners witness Uhl admitted that it is the practice to put a life upon such structures as concrete dams and that he would consider them and specifically, the Holtwood dam, as depreciable. (page 120)

66. That methods of accounting for depreciation are in and of themselves evidence of actual accrued depreciation or actual annual depreciation expense. (page 121)

67. That Petitioners accrue amounts to the reserve for depreciation according to the straight-line method. (page 121)

68. That the evidence offered by the Commission Staff in this proceeding as to how certain electric companies treat mass-concrete dams furnishes a basis for concluding that Petitioners' concrete dam is depreciable. (page 121)

69. That the plant items of the electric companies referred to by Commission Staff in the record are comparable to Petitioners' plant. (page 121)

70. That "such plant items as are mentioned above have a limited service life and are properly subject to depreciation allowances in order to prevent the impairment of capital". (page 121)

71. That there is a general practice of treating long-life properties such as mass concrete in dams as depreciable. (page 121)

72. That the treating of the property which Petitioners claim as non-depreciable as depreciable property is clearly correct. (page 121)

73. That Petitioners' proposal to treat certain items of property as non-depreciable is a novel treatment and is not sound from either the financial or regulatory viewpoint. (page 121)

74. That "Upon a consideration of all the evidence it is found that reasonable and proper composite service lives for the steam, hydraulic, transmission and general plant classifications are 42, 69, 57 and 35 years, respectively, with corresponding annual depreciation rates of 2.38%, 1.45%, 1.75%, and 2.86%". (page 121)

75. That the average accrued depreciation in Petitioners' property for the year 1946 was $9,001,873. (page 121)

76. That Petitioners "witness Gunn derived his estimate of the adequate annual allowance of $400,000 by applying to the 1945 book allowance for depreciation, $574,245, the ratio of his determination of the proper reserve at the end of 1945, $6,000,000, to the December 31, 1945 book balance in the depreciation reserve, $8,976,358, and increasing the result to $400,000 after consideration of several intangible counteracting factors". (page 122)

77. That Petitioners witness Gunn's recommendation of $400,000 is upon the straight-line basis. (page 122)

78. That Petitioners witness Gunn assumed a straight-line basis of accumulation in his determinations of depreciation. (page 122)

79. That Petitioners witness Gunn included no allowance for obsolescence in his $400,000 annual allowance for depreciation. (page 122)

80. That Petitioners witness Gunn's derivation of the $400,000 annual allowance can only be sustained by validation of his use of the ratio of his determination of the reserve requirement to the book reserve. (page 123)

81. That Petitioners witness Gunn's determination of the reserve requirement cannot be accepted. (page 123)

82. That no basis exists for accepting Petitioners witness Gunn's determination of annual allowance for depreciation. (page 123)

83. That procedures followed by Petitioners witness Gunn were impractical or unsound. (page 123)

84. That Petitioners witness Gunn's $400,000 recommended annual allowance would be inadequate to return the investment in presently owned depreciable property to Petitioners over the service lives of such property. (page 123)

85. That Petitioners witness Gunn's 2½% of depreciation to be applied to additions is excessive. (page 123)

86. That the fact that Petitioners witness Gunn's annual allowance for depreciation and determination of accrued depreciation would result in a fair allowance over a period of years is the result of accident rather than sound practices. (page 123)

87. That the Staff's computation of annual allowance conformed to standard practice. (page 123)

88. That the depreciation rates assumed by the Commission Staff witnesses are proper. (page 123)

89. That Commission Staff witnesses were correct in applying the depreciation rates found by the Commission to be proper here to the average of the appropriate plant balances for the year. (page 123)

90. That the proper annual allowance for the year 1946 is $467,701. (page 123)

91. That Petitioners witness Dorau's testimony is the only evidence in the support of their contention that their rate base should be undepreciated. (page 124)

92. That the use of the sinking-fund method with a rate of interest applicable to the sinking fund, lower than the rate of return allowed on the investment, has the effect of not crediting the consumer with the full amount of the investment which is repaid by him in the form of depreciation expense. (page 124)

93. That depreciation expense represents a repayment of investment by the consumers. (page 124)

94. That Petitioners witness Dorau's contention as to the validity of an undepreciated rate base is that the reserve investment is "an actual fund". (page 125)

95. That Petitioners witness Dorau's testimony is fallacious. (page 125)

96. That depreciation reserve assets do not in fact or theory constitute a trust fund. (page 125)

97. That funds coming into the possession of a utility through allowance of depreciation expense belong to the utility absolutely and may be used for all purposes. (page 125)

98. That funds coming into the hands of the utility through allowance of depreciation expense can be used to pay off all debts. (page 125)

99. That if assets reflected by the depreciation reserve are invested in stocks and bonds, rate regulation does not take them into account. (page 125)

100. That Petitioners witness Dorau's trust fund analogy is strained. (page 125)

101. That accrued depreciation represents "that part of the cost of plant which relates to the past—expired service life". (page 125)

102. That if accrued depreciation is not deducted in determining rate base a "cost of past operations becomes the basis for a continuing charge". (page 125)

103. That there are equitable grounds for deducting accrued depreciation from cost to determine Petitioners' rate base. (page 126)

104. That consumers pay for plant consumption. (page 126)

105. That "it is just as inequitable to charge a return on the amount reimbursed as it would be to charge a return on the cost of coal consumed in a previous year and duly recovered in operating expenses". (page 126)

106. That the results of Petitioners witnesses' computations "do not constitute a valid argument, *per se*,

against the straight-line method and the employment of a depreciated rate base". (page 126)

107. That the use of the sinking-fund method would postpone recoupment of a high portion of Petitioners' investment to the remote time when the properties are old, maintenance high and obsolescence a greater hazard. (page 126)

108. That "this would entail greater financial risks and might result in serious capital impairment". (page 126)

109. That the Safe Harbor Water Power Corporation case hereinbefore decided by the Commission correctly determines the issues raised therein. (page 126)

110. That the Safe Harbor Water Power Corporation case is a precedent for the instant use. (page 126)

111. That the record in this proceeding does not alter what was said by the Commission in the case of Safe Harbor Water Power Corporation. (page 126)

112. That the use of a depreciated rate base in this proceeding is proper. (page 127)

113. That Petitioners' book reserve approximates a proper reserve requirement. (page 127)

114. That a reserve requirement as computed by the Staff represents a proper reserve. (page 127)

115. That the book reserve of Petitioners should be deducted as a measure of accrued depreciation in Petitioners' property. (page 127)

116. That Petitioners' book reserve is only slightly higher than its reserve requirement, and even the excess represents payment to Penn Water by its customers for deferred maintenance. (page 127)

117. That "we find that from Respondents' (Petitioners) average investment in plant for 1946,

$33,126,585, the reserve for depreciation, averaged for the year $9,001,873, should be deducted in arriving at the 1946 rate base". (page 127)

Whenever in the Opinion or "Order Reducing Rates" in this case the Commission has adopted or referred to the record or Opinion No. 143 in the case of Safe Harbor Water Power Corporation, Docket IT-5914, Petitioners adopt and make a part hereof all of the points set forth in the application for rehearing in that case filed with the Commission on December 4, 1946.

(65) Petitioners herein object to and seek rehearing of Opinion No. 173 of the Commission because of its failure to find the following facts and make the following conclusions of law, said failure to find the following facts being contrary to the substantial evidence in the record and the failure to determine the following conclusions of law being contrary to law, the Federal Power Act and results in depriving Petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States:

1. That the accrued depreciation in Petitioners' property amounted to approximately $4,500,000 as of December 31, 1945 and an adequate depreciation reserve as of the same date amounted to $6,000,000.

2. That the testimony of Petitioners witnesses Gunn and Uhl was based upon comprehensive engineering and economic studies of Petitioners' property and is substantial, uncontradicted evidence as to the proper amount of actual depreciation on December 31, 1945.

3. That Staff witness Roland was incompetent to determine service lives of Petitioners' property and his testimony and exhibits should be rejected.

4. That the service lives assigned to Petitioners' properties by Commission Staff are arbitrary and unsupported by substantial evidence.

5. That property is non-depreciable when there are no causes, physical or non-physical, in current operation which will bring about its retirement and when the property will continue in use, substantially unchanged, as long as the enterprise exists.

6. That the following property of Petitioners is properly classified as non-depreciable: the forebay ramp, the mass concrete in the dam and tailrace deflection wall, and the excavation for the tailrace, dam and powerhouse.

7. That if the forebay ramp, the mass concrete in the dam and tailrace deflection wall, the excavation for the tailrace, dam and powerhouse are classified as depreciable and assigned the Staff's recommended lives, it will result in the accumulation of a grossly excessive reserve for depreciation.

8. That the service lives used by the Staff were erroneous and the amount of the depreciation determined thereby is erroneous.

9. That the use of the straight-line method of depreciation with the service lives recommended by Commission Staff is not proper and deprives Petitioners of property without due process of law and results in a method which is unlawful, unjust and discriminatory to Petitioners.

10. That the actual depreciation in Petitioners' property should as a matter of law and can as a matter of fact be determined by comprehensive engineering and economic studies of such property based upon the same principles that govern the installation and retirement of property.

11. That Petitioners witnesses Gunn and Uhl possess the necessary qualifications to make such engineering and economic studies to determine actual depreciation in Petitioners' property and said witnesses employed proper methods in their studies.

12. That a determination of actual depreciation, proper reserve balance and the annual allowance for Petitioners' property, simply by accounting methods, is unsound and must yield to the facts developed by comprehensive engineering and economic studies of such property made by Petitioners' witnesses.

13. That depreciation is the loss of service value which is manifested in property because it is property which depreciates, not the money which has been used to acquire property, nor the accounts in which it is recorded.

14. That depreciation is factual in nature and occurs at the time and to the extent of the incidence and progression of its causes.

15. That depreciation does not occur by reason of the mere expiration of time, nor in the absence of causes actually operating to bring about the retirement of property.

16. That depreciation, as applied to electric plant of Petitioners, means the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of electric plant in the course of service from causes which are known to be in current operation and against which the utility is not protected by insurance. Among the causes to be given consideration are wear and tear, decay, action of the elements, inadequacy, obsolescence, changes in the art, changes in demand and requirements of public authorities.

17. That a study by competent persons of the effect of causes of depreciation is essential, to determine the proper amount of the depreciation reserve as well as a proper annual allowance for Petitioners' property.

18. That it is correct to determine physical depreciation through a comparison of the property under

consideration with the condition of the property when new and also with its condition when it will be replaced.

19. That it is correct to determine economic depreciation through a comparison of the property under consideration with the most economical practical property that will give the same quantity and quality of service.

20. That the size of the depreciation reserve should be governed by the amount of depreciation actually existing in the property.

21. That the size of the depreciation reserve should be greater than the depreciation existing in the property by an adequate factor of safety to cover unforeseen contingencies.

22. That Commission Staff, in its use of the straight-line method of computing depreciation erroneously assumes that actual depreciation occurs in equal annual amounts.

23. That Staff witness Roland fixed service lives of Petitioners' property as a result of speculation, and guesswork, and his service lives must be rejected.

24. That the inspection of Petitioners' property and records by Staff witness Roland was cursory and wholly inadequate for the purpose of accurately determining depreciation in Petitioners' property or a proper annual allowance.

25. That the so-called life tables of other companies utilized by Staff witness Roland were clearly inapplicable to Petitioners' property which was recognized by him to be unique.

26. That an adequate reserve for Petitioners' property as of December 31, 1945 was $6,000,000 rather than the adjusted book reserve for depreciation figure of $8,763,118.

27. That the annual charge for depreciation to be applied to Petitioners' property at the present time should be $400,000 plus 2½% per annum applied to net additions of depreciable property subsequent to December 31, 1945.

28. That depreciation does not occur in equal annual amounts.

29. That the annual allowance for depreciation in Petitioners' property should be so determined as to provide for large items of deferred maintenance.

30. That the testimony and exhibits of Petitioners witness Gunn constitute substantial and uncontradicted evidence that the amount of $400,000 plus 2½% per annum on net additions of depreciable property subsequent to December 31, 1945 is a fair and reasonable annual charge for depreciation in Petitioners' property.

31. That the straight-line method used by Commission Staff is based on assumed service lives which are fundamentally erroneous and the annual charge for depreciation, based thereon, is also erroneous.

32. That a fair and reasonable annual depreciation charge cannot be determined by an arbitrary choice of accounting method.

33. That it is necessary as a matter of law to make thorough and exhaustive studies of actual depreciation by qualified and experienced engineers to determine the proper charges to depreciation expense and Commission Staff witnesses failed to make such studies.

34. That Petitioners witness Gunn is a qualified and experienced engineer and his testimony and exhibit as to the proper annual depreciation charge for Petitioners' depreciable property constitute substantial and uncontradicted evidence.

35. That an annual charge for depreciation of $467,781 for Petitioners' depreciable property for the year 1946, as well as similarly computed amounts for future years, is improper and unlawful.

36. That the amount of annual depreciation allowance recommended by Commission Staff is the result of its witnesses arbitrarily applying an accounting formula unrelated to the actual facts of depreciation and is excessive.

37. That the purpose of accounting, including accounting for depreciation, is to record the facts and the legal effect of business transactions and occurrences; and accounting methods unrelated to the true facts determine nothing.

38. That the facts as to actual depreciation should determine and control the accounting; and the accounting should not be permitted to distort the facts or their legal consequences.

39. That Mr. Roland did not base his service lives for Petitioners' property on the only factual basis available, i. e., actual existing depreciation.

40. That Mr. Roland did not give proper consideration to the causes of depreciation in determining service lives for Petitioner.

41. That the use of an equal annual charge for depreciation with a substantially risk-free credit or the sinking-fund method of accounting with an interest rate equal to that which is actually earnable from investments which are substantially risk-free, will not do any injustice to consumers, but, on the contrary will result in equality and justice to both consumers and investors.

42. That the use of an equal annual charge for depreciation with a substantially risk-free credit or the sinking-fund method of accounting with an interest rate

equal to that which is actually earnable from investments which are substantially risk-free, will not result in the investors earning more than a fair return on their investment.

43. That the use of an equal annual charge for depreciation with a rate of return credit or a sinking-fund method of accounting for depreciation with an interest rate equal to the rate of return will discriminate against the investors and in favor of the consumers and will be unfair, unjust, unreasonable and confiscatory to the investors.

44. That Petitioners showed by substantial evidence that deduction of the reserve balance would result in a declining rate base and in a failure to earn the rate of return intended, and that the only circumstances under which the enterprise would actually earn the intended fair rate of return are those in which an undepreciated rate base is employed in conjunction with a consumer credit on depreciation reserve balances equal to the income actually earned upon the investment of the assets reflected by such balance without added risks, hazards and uncertainties.

45. That Petitioners have showed by substantial evidence that the regulatory procedure recommended by Commission Staff would result in a declining rate base and a failure of the enterprise to earn the intended fair rate of return in the future.

46. That under the straight-line method with a reserve balance deduction it is impossible for Petitioners to earn a predetermined rate of return on their investment unless the enterprise assumes additional risks, uncertainties and responsibilities in the employment of the funds generated by the reserve accrual and thus no predetermined fair rate of return can actually be earned under this method.

47. That there cannot be full employment of every dollar accrued for depreciation from the time of its accrual.

48. That the testimony of Staff witness Dunn must be rejected because his conclusions are erroneous and are based upon assumed service lives which in and of themselves are fundamentally erroneous.

49. That Commission Staff desiring to deduct the greatest possible amount from Petitioners' original cost to arrive at their rate base computed a composite rate of depreciation that would result in a reserve requirement of approximately the same amount as Petitioners' excessive book reserve by dividing the total of the past accruals to the depreciation reserve by the total accumulated average annual balances of what the Staff considered depreciable electric plant.

50. That Staff witness Roland was given by Commission's accounting staff a predetermined average depreciation rate of 1.73%, for the purpose of designing a life table which would appear to justify that rate.

51. That Commission Staff predetermined the average depreciation rate for Petitioners' property which it desired prior to the time Staff witness Roland began his studies for the purpose of fixing service lives.

52. That the determination of just and reasonable rates for Petitioners under Section 206 (a) of the Federal Power Act requires the application of a fair utility rate of return to an undepreciated rate base.

53. That a credit of 3% on a depreciation reserve balance of $6,000,000 as of December 31, 1945 plus a credit of 3% on all subsequent net increases of the depreciation reserve should be granted to Petitioners' customers.

54. That the use of a depreciated rate base would constitute a deprivation of Petitioners' property without due process of law in violation of the 5th Amendment of the Federal Constitution and the Federal Power Act.

55. That Petitioners, by virtue of their status as licensees, are entitled, whenever their rates and charges are regulated or controlled by the Federal Power Commission, to have such rates and charges regulated and controlled in accordance with the provisions of the Federal Power Act. Under the general provisions of licenses and the provisions of said Act, Petitioners are entitled to a fair return upon their "net investment" and their "net investment" is:

> "the actual legitimate original cost thereof (the project) as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission,' plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created."

The Petitioners' "net investment" as determined by the Commission does not accord with and is contrary to the statutory definition contained in Section 3 (13) of the Federal Power Act.

56. That the use of an undepreciated rate base together with the granting of a credit of 3% to customers on an adequate depreciation reserve balance is fair and equitable to both investors in and customers of Petitioners.

57. That the use of a depreciated rate base would illegally impose upon Petitioners' investors the re-

sponsibility for the custody and management of the assets reflected by the depreciation reserve balance without compensation to the investors for this burden.

58. That the assets accumulated from advances by consumers for depreciation expense are not a return of capital to investors because they are not free assets but must be retained in the business and thus remain devoted to public use.

59. That the advances made with respect to depreciation do not constitute a return of the investment to the investors and in no real and economically meaningful sense do they even return the investment to the enterprise because such funds are collected and retained for restricted purposes; in effect, the enterprise does not come into a full and unincumbered ownership of such assets until its rights in them have been matured by a retirement.

60. That Petitioners' investors are entitled to earn and receive a fair return upon the money prudently invested by them and used in rendering public service, until such time as their investment is returned to them as free capital.

61. That it is the duty of Petitioners to render efficient, dependable and continuous service to the public until relieved of that obligation by proper regulatory authorities and the consumers have the obligation to pay the total cost thereof.

62. That it is the duty of Petitioners to accumulate and maintain an adequate depreciation reserve, the primary purpose of which is to enable Petitioners to maintain their plant in proper condition for efficient operation.

63. That it is the duty of Petitioners to retain within the business the assets reflected by the depreciation reserve and Petitioners may not return these assets to their investors as free capital.

64. That the nature of hydroelectric property employed in the public service requires the collection of large sums on account of depreciation long in advance of the time when they will be needed for the purposes which justified their collection.

65. That Petitioners' property is relatively static and is long lived, and abnormally large sums must be collected on account of depreciation and held for unusually long periods with little or no opportunity to invest with regularity such funds in utility property.

66. That the assets reflected by the depreciation reserve balance of a public utility must be held in the enterprise to replace property retired and maintain the integrity of the investment, and cannot legally be returned to the investors.

67. That the measurement by engineering studies of actual existing depreciation is more accurate and reliable than assumptions of service lives of Petitioners' property and should govern and control the amount of the depreciation reserve balance.

68. That the assets reflected by the depreciation reserve balance remain devoted to the public service and are not free capital which can be returned by the company to the investors.

69. That the net cost of the retention of the assets reflected by the depreciation reserve balance in a utility enterprise is an unavoidable part of the cost of the service and should be borne by the customers.

70. That the use of an undepreciated rate base is proper since Petitioners are required to have an amount of assets in excess of capital stock, debts and other liabilities sufficient to equal the reserve for depreciation or their capital will be impaired.

71. That the capital invested in Petitioners is not and cannot be returned to the investors until the regu-

latory authorities determine that such capital is no longer needed in the business and may be disinvested.

72. That Petitioners' investors are entitled to receive the utility rate of return upon their undepreciated investment for the reason that no part of it has been returned to them.

73. That the customers of Petitioners are entitled to receive the benefit of whatever return may be obtained from the investment of the assets reflected by the reserve for depreciation in securities which are substantially risk-free which return is deemed to be for the present 3%.

74. That the requirement of a 3% credit to consumers, even though not actually earned on the reserve assets, furnishes the incentive and obligation for management to economically utilize such fund.

75. That the net cost of the retention of the assets reflected by the depreciation reserve balance is measured by the difference between the utility rate of return and the rate which is earnable on substantially risk-free capital.

76. That part of the cost of service which arises from the retention in the enterprise of the assets reflected by the depreciation reserve balance should be borne by the consumers just as all other parts of the cost of service.

77. That in computing the net cost of the retention of the assets reflected by the depreciation reserve balance, the consumers are entitled to a credit of no more than is actually earnable on substantially risk-free capital because they assume no risk and in the event of loss, the absolute and undivided responsibility for the loss must be borne by the investors.

78. That the net cost to Petitioners of the custody and management of the assets reflected by the reserve

for depreciation is a cost of rendering public utility service not substantially different from the recognition and allowance of the cost of necessary Working Capital and Materials and Supplies.

79. That if by any regulatory procedure the consumers are allowed any greater reduction of the depreciation burden such allowance can only be made at the expense of the investors who will either receive less than a fair return on their investment or will be compelled to assume additional risks, uncertainties and responsibilities for which they will not receive adequate compensation.

80. That investment of assets reflected by the reserve for depreciation in government bonds would improperly compel Petitioners to sustain a loss of income represented by the difference between a fair rate of return for a public utility and the yield on such government bonds.

81. That investment of the assets reflected by the reserve for depreciation in bonds of other companies would improperly impose upon Petitioners a loss of income represented by the differential between a fair rate of return for a public utility and the yield on such bonds.

82. That investment of the assets reflected by the reserve for depreciation in stocks of other companies would result in the investment of funds originally dedicated to public use in alien enterprises and ventures over which Petitioners would have no control.

83. That investment of the assets reflected by the reserve for depreciation in stocks of other companies would impose upon Petitioners the risk of other enterprises, which risks would be different and additional to that of operating Petitioners' property.

84. That the investment of the assets reflected by the reserve for depreciation in retirement of Petitioners' own bonds would improperly require Petitioners to lose the income derived from the employment of their

capital represented by the difference between a fair rate of return for a public utility and the interest payable on their bonds.

85. That a depreciated rate base is not appropriate when investment is the standard for rate base determination.

86. That the historical practice of deducting actual depreciation in order to arrive at "fair value" does not warrant the deduction of actual depreciation from original cost in the instant case.

87. That the deduction of the reserve for depreciation from Petitioners' original cost to determine the rate base illegally and inequitably relieves Petitioners' customers of the obligation to pay any return on that portion of the investment reflected by the reserve for depreciation.

88. That the assumption of Commission Staff witnesses that the use of the straight-line method of accounting for depreciation necessarily requires the use of a depreciated rate base for the purpose of determining a fair return is without foundation.

89. That the testimony and exhibits of Petitioners' witness Dorau furnish substantial evidence which is controlling.

90. That Petitioners' witness Dorau has established that the deduction of the reserve balance from original cost in determining Petitioners' rate base would result in a declining rate base and in a failure to earn the rate of return intended.

91. That the straight-line method of computing depreciation results in the retention in the enterprise of the largest amount of assets for the longest period of time and therefore results in the greatest total actual cost of the service.

92. That if depreciation is to be deducted in determining a rate base, only the adequate reserve balance of $6,000,000 should be so deducted.

That the Petitioners seek rehearing of the Opinion and Order for the purpose of proving that the adjusted reserve balance of $9,240,628 as determined by the Commission as of December 31, 1946 was excessive when compared to the total depreciable plant of $26,651,886 as of December 31, 1946, resulting in a ratio of adjusted reserve balance to depreciable plant of 34.67%. That this ratio has become increasingly excessive as evidenced by the fact that as of December 31, 1948 the adjusted reserve balance was $10,258,925 and the total depreciable plant was $27,161,528 resulting in a ratio of adjusted reserve balance to depreciable plant of 37.77%. or an increase of approximately 9%.

(66) Petitioners seek rehearing of the statement, findings, and conclusions on pages 132, 133, 138, and 141 of the Commission's Opinion No. 173, which read as follows:

"Upon a careful review of the extensive evidence of record in this proceeding which deals with the subject of rate of return, and applying the principles controlling the determination of a proper rate for utilities as enunciated by the Supreme Court, it is found that a rate of return of 5¼% for Respondents is fair and reasonable."

* * *

"Respondents are very little subject to even the ordinary risks of an electric operating utility. Penn Water * * * possesses strong power contracts, and is in a very favorable financial position. The contract with Baltimore Company assures Respondents of a stabilized income on a basis prior even to the return of the holders of the common stock of Baltimore Company."

* * *

"We find, therefore, that a rate of return of 5¼%, applied to the rate base heretofore described ($24,774,712 for 1946) is fair and reasonable. This rate of return which is based upon 3.17% for bonds and

5.21% for preferred stock, allows about 8.64% for common stock and surplus, which is adequate. This return for equity, which takes into consideration cost of floating the stock accords greatest weight to the most recent data and allows for the upward trend in equity investor requirements."

• • •

That the fair return is $1,300,672. (page 141) on the grounds that:

(a) A rate of return of 5¼% does not adequately compensate Petitioners for existing hazards and risks including among others, damage from flood, ice and storms, the progress of other methods of electric generation at lower cost thus presaging more competitive conditions, government competition, Petitioners' lack of a territory in which they enjoy a monopoly and the risks incident to variations in river flow; and

(b) The return provided of $1,300,672 does not reasonably assure confidence in Petitioners' financial soundness and is not adequate to assure Petitioners' ability to maintain their credit and to enable them to raise the capital necessary for the discharge of their public duties; and

(c) The return of $1,300,672 provided by the order is less than the return enjoyed by other invested capital in the same territory subject to corresponding risks and uncertainties; and

(d) The Commission's Order will result in depriving Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States; and

(e) The statements, findings and conclusions are not supported by substantial evidence of record, are contrary to the substantial evidence of record and are contrary to law and the Federal Power Act; and

(f) The Commission failed to find that 6½% is the fair and reasonable rate of return; and

(g) The Commission failed to find that the return resulting from the 6½% fair rate of return applied to original cost undepreciated is the fair and reasonable return; and

(h) The Commission failed to find that the minimum fair return required by Petitioners, after appropriate treatment for depreciation, is $2,270,000; and

(i) The Commission failed to find that 9.25% is the capitalization rate of and is the proper and fair allowance for return on the equity capital.

(j) As stated in paragraph II (6) (c) above.

(67) Petitioners seek rehearing of the statements, findings, and conclusions on pages 25, 26 and 133 of the Commission's Opinion No. 173, as follows:

> That Petitioners' evidence as to (1) reproduction cost, (2) the cost of a substitute plant and (3) original cost stated in terms of the purchasing power of the dollar in 1945, was properly excluded and that such evidence is unnecessary and useless for rate making purposes and would not aid in the determination of just and reasonable rates. (pages 25, 26)
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> • • •
>
> "The witness' method involves the attempted injection of speculative reproduction cost through the back door, i. e., rate of return testimony. It cannot be accepted."

on the grounds that:

(a) The statements, findings, and conclusions are not supported by substantial evidence, are contrary to the substantial evidence and are contrary to law and the Federal Power Act; and

(b) The Commission's failure to find that such evidence is admissible and is essential to the determination of the proper rate base and the fair and reasonable return results in depriving Petitioners of a fair and reasonable return and of their property without due process of law.

(68) Petitioners seek rehearing of the statements, findings, and conclusions made on pages 134 and 136 of the Commission's Opinion No. 173, referring to Penn Water's outstanding bonds, which read as follows:

> "The series of 1964, in the principal amount of $10,900,000, offered in 1939, was issued at a premium and on a yield basis of 3.02% and at a cost rate to maturity of 3.20%. The series of 1970, in the principal amount of $10,962,000, offered in 1940, was issued at a premium and on a yield basis of 3% and at a cost rate of 3.14%."
>
> * * *
>
> "Accordingly, we find that Respondent Penn Water's cost of bond money for purposes of this rate proceeding is 3.17% * * *."

on the grounds that:

(a) The statements, findings, and conclusions are not supported by substantial evidence of record and are contrary to the substantial evidence of record; and

(b) The Commission failed to find that the cost rates of the 1964 series and 1970 series are 3.21% and 3.83%, respectively, and that the cost of bond money to Penn Water for the purpose of this proceeding is 3.505%.

(69) Petitioners seek rehearing of the statements, findings, and conclusions on page 138 of the Commission's Opinion No. 173, which read as follows:

> "As of December 31, 1946, and subsequent to the adjustment to surplus which is required in the finding

and order herein, Respondents' capitalization consists of 58.19% outstanding debt in the amount of $20,313,000, 6.10% cumulative preferred stock (no Par) in the book amount of $2,130,895.50, and 35.71% common stock in the stated amount of $10,868,312.50 with a surplus of $1,598,812.18."

on the grounds that:

(a) The statements, findings, and conclusions are not supported by substantial evidence of record and are contrary to the substantial evidence of record; and

(b) The adjustment to surplus is contrary to law, is not supported by substantial evidence of record and is contrary to the substantial evidence of record; and

(c) The Commission failed to find that Petitioners' capitalization consists of 52% outstanding debt, 5.4% cumulative preferred stock (no par) and 42.6% common stock and surplus.

III. The Commission's statements, findings, and conclusions in its "Order Reducing Rates", issued January 5, 1949, as referred to below are contrary to the evidence, are unsupported by any substantial evidence, unsupported by adequate subsidiary findings, are unlawful, erroneous, arbitrary, capricious, and unconstitutional and operate to deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and result in an exercise of authority in excess of statutory jurisdiction, authority, or limitations; and Petitioners seek rehearing on each and every one of the following purported findings on the grounds hereinafter stated:

(1) Finding No. (1) on the grounds as stated in paragraph II (3) herein.

(2) Finding No. (2), to the extent that it finds that Safe Harbor owns, operates, and maintains transmis-

sion facilities on the grounds that such statement is not supported by any substantial evidence and is contrary to the evidence.

(3) Finding No. (5) on the grounds herein specifically set forth in paragraphs I (6) (h), I (9), II (4), II (12), II (13), and II (14).

(4) Finding No. (6) on the grounds herein specifically set forth in paragraphs I (6) (a) (iii), I (6) (a) (iv), I (6) (b), I (6) (h), I (9), II (5), II (7), II (12), II (13), II (14), II (16), II (28).

(5) Finding No. (7) on the grounds herein specifically set forth in paragraphs I (6) (a) (iii), I (6) (a) (iv), I (6) (b), I (6) (h), I (9), II (5), II (6), II (12), II (13), II (14), II (16), II (17), II (20), II (25), II (26), II (27), II (28), II (58).

(6) Finding No. (8) on the grounds herein specifically set forth in paragraphs I (4), I (6) (h), I (9), II (4), II (5), II (6), II (7), II (11), II (12), II (13), II (14), II (15), II (19), II (57).

(7) Finding No. (9) on the grounds herein specifically set forth in paragraphs I (4), I (6) (h), I (9), II (4), II (5), II (6), II (7), II (11), II (12), II (13), II (14), II (15), II (19), II (57).

(8) Finding No. (10) on the grounds herein specifically set forth in paragraphs I (4), I (6) (h), I (9), II (4), II (5), II (6), II (7), II (11), II (12), II (13), II (14), II (15), II (19), II (57).

(9) Finding No. (11) on the grounds herein specifically set forth in paragraphs I (4), I (6) (a) (iii), I (6) (a) (iv), I (6) (b), I (6) (h), I (9), II (4), II (5), II (6), II (7), II (11), II (12), II (13), II (14), II (16), II (17), II (19), II (20), II (25), II (26), II (27), II (28), II (57), II (58).

(10) Finding No. (12) on the grounds herein specifically set forth in paragraphs I (6) (h), II (4), II (5), II (6), II (7), II (11), II (12), II (13), II (14), II (15), II (19), II (57).

(11) Finding No. (13) on the grounds herein specifically set forth in paragraphs I (6) (h), II (4), II (5), II (6), II (7), II (11), II (12), II (13), II (14), II (15), II (19), II (57).

(12) Finding No. (14) on the grounds herein specifically set forth in paragraphs III (1) through III (11), inclusive.

(13) Finding No. (15) on the grounds herein specifically set forth in paragraphs I (4), I (6) (a) (i), I (6) (a) (iv), I (6) (b), I (6) (h), I (9), II (8), II (11), II (12), II (13), II (16), II (17), II (41), II (44), II (51), II (57).

(14) Finding No. (16) on the grounds herein specifically set forth in paragraphs I (4), I (6) (a) (i), I (6) (a) (iv), I (6) (b), I (6) (h), I (9), II (8), II (11), II (12), II (13), II (16), II (17), II (41), II (44), II (51), II (57).

(15) Finding No. (17) on the grounds herein specifically set forth in paragraphs III (1) through III (11).

(16) Finding No. (18) on the grounds herein specifically set forth in paragraphs III (1) through III (15).

(17) Finding No. (20) on the grounds herein specifically set forth in paragraphs III (1) through III (16).

(18) Finding No. (21) on the grounds herein specifically set forth in paragraphs I (1), I (2), II (18), II (21).

(19) Finding No. (22) on the grounds herein specifically set forth in paragraphs I (1), I (2), II (18), II (22), III (1) through II (sic) [III] (18).

(20) Finding No. (23) on the grounds herein specifically set forth in paragraphs I (1), I (2), II (18), II (22), III (1) through III (19).

(21) Finding No. (24) on the grounds herein specifically set forth in paragraphs I (4), I (6), I (7), I (9), II (2), II (8), II (11), II (12), II (13), II (16), II (17), II (35), II (41), II (44), II (51), II (53), II (54), II (60) to II (67), inclusive.

(22) Finding No. (25) on the grounds herein specifically set forth in paragraphs II (60) to II (65) inclusive, and II (67).

(23) Finding No. (26) on the grounds herein specifically set forth in paragraphs II (60) to II (65), inclusive, and II (67).

(24) Finding No. (27) on the grounds herein specifically set forth in paragraphs II (64), II (65).

(25) Finding No. (28) on the grounds herein specifically set forth in paragraphs II (64), II (65).

(26) Finding No. (29) on the grounds herein specifically set forth in paragraphs II (60), II (61).

(27) Finding No. (30) on the grounds herein specifically set forth in paragraphs I (4), I (5), I (6), I (7), I (9), II (2), II (56), II (59), II (60) to II (67), inclusive.

(28) Finding No. (31) on the grounds herein specifically set forth in paragraphs II (66) to II (69), inclusive.

(29) Finding No. (32) on the grounds herein specifically set forth in paragraph II (30).

(30) Finding No. (33) on the grounds herein specifically set forth in paragraph II (55).

(31) Finding No. (34) on the grounds herein specifically set forth in paragraphs II (55), II (56).

(32) Finding No. (35) on the grounds herein specifically set forth in paragraphs II (60) to II (65), inclusive, and II (67).

(33) Finding No. (36) on the grounds herein specifically set forth in paragraphs II (66) to II (69), inclusive.

(34) Finding No. (37) on the grounds herein specifically set forth in paragraphs I (8), I (9), II (6), II (58), II (59), II (62) to II (69), inclusive.

(35) Finding No. (38) on the grounds that such finding is contrary to law and without authority under the Federal Power Act.

IV. The Commission's orders or requirements in its "Order Reducing Rates" as set forth below are erroneous in law and fact, are contrary to the evidence, and are unsupported by any substantial evidence, unsupported by findings, and are unlawful, erroneous, arbitrary, capricious and unconstitutional, operate to deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States and result in an exercise of authority in excess of statutory jurisdiction, authority or limitations; and Petitioners seek rehearing on each and every one of the following orders or requirements:

(1) Paragraph (A) of the Order on the grounds herein specifically set forth in paragraphs I, II and III.

(2) Paragraphs (C) and (D) of the Order on the grounds herein specifically set forth in paragraphs I, II and III.

(3) Paragraph (E) of the Order on the ground that the Commission has no jurisdiction, authority, or power, under the Federal Power Act to reject any schedules of rates or charges or any rules, regulations, practices, or contracts affecting any such rates or charges, except after following the procedure prescribed by Section 205 (e) of the Act (16 U. S. C. 1946 Ed., Sec. 824d (e), 49 Stat. 851).

(4) Paragraph (F) of the Order on the grounds herein specifically set forth in paragraphs II (64), II (65).

(5) Paragraph (G) of the Order on the grounds herein specifically set forth in paragraphs I, II, III.

(6) Paragraph (H) of the Order on the grounds herein specifically set forth in paragraph I (8).

(7) Paragraph (I) of the Order on the grounds herein specifically set forth in paragraphs I, II, III.

V. Petitioners seek rehearing of the Commission's "Order Reducing Rates" on the ground that the Commission failed to affirm the Petitioners' following requests for findings:

"1. Pennsylvania Company (Penn Water) owns and operates a project, as defined in Section 3 (11) of the Federal Power Act, and develops, transmits and distributes power for sale or use in public service in the State of Pennsylvania.

• • •

"3. Pennsylvania Company receives power from Safe Harbor, a licensee under the Federal Power Act, and transmits, distributes, sells and uses in public service such power within the State of Pennsylvania.

"4. The States of Pennsylvania and Maryland have each authorized and empowered commissions within such States to regulate and control the services to be rendered by Respondents and the rates and charges of payment therefor.

"5. The States of Pennsylvania and Maryland have each authorized and empowered commissions within such States to enforce the requirements of Section (sic) 19 and 20, or any provisions of the Federal Power Act which commit authority to the States.

"6. The Pennsylvania Public Utility Commission is now actively engaged in the regulation and control of the rates and charges of Pennsylvania Company.

• • •

"8. There is no evidence of record that the States of Pennsylvania and Maryland are unable to agree through

their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor of Respondents.

"9. The rate regulatory provisions of Part II of the Federal Power Act are not applicable to the rates or charges of Respondents which are subject to regulation and control under the provisions of Part I of the Act.

"10. Respondents demand, observe, charge, or collect no rates, charges or classifications which are for a transmission of electric energy in interstate commerce or for a sale of electric energy at wholesale in interstate commerce.

"11. The rates or charges, participated in by Pennsylvania Company, for joint services to the Pennsylvania Railroad Company (Railroad) are not for sales of electric energy at wholesale.

"12. All revenues received by Pennsylvania Company for its participation in joint service to the Pennsylvania Railroad Company are its division of the joint rates or charges demanded, observed, charged and collected from the Railroad by Baltimore Company, and such revenues are not all retained by Pennsylvania Company.

"13. Firm power revenues are received by Pennsylvania Company, acting for itself and as agent for Safe Harbor, from Pennsylvania Power & Light Company (PP&L) and Philadelphia Electric Company (Philadelphia Company), for joint service to such companies by Pennsylvania Company and Safe Harbor, and all of such revenues are not retained by Pennsylvania Company.

"14. Revenues received by Pennsylvania Company from Baltimore Company are independent of the services rendered to Baltimore Company and are its division of the total payments by Baltimore Company to Pennsylvania Company and Safe Harbor for the joint services rendered

by the latter companies; and include compensation for services rendered the Pennsylvania Railroad Company.

"15. The Commission has no authority, under the provisions of the Federal Power Act, to regulate, control or fix any divisions of joint rates received by Pennsylvania Company.

"16. The Commission has no authority, under the provisions of the Federal Power Act, to regulate, control or fix any joint rates, charges, classifications, rules, regulations, practices or contracts participated in by Pennsylvania Company without according a hearing on adequate notice to all participants in such joint rates, charges, classifications, rules, regulations, practices or contracts.

"17. The Commission has no authority, under the provisions of the Federal Power Act, to regulate, control or fix any rates, charges, classifications, rules, regulations, practices or contracts of Respondents because they have not been afforded a fair hearing or adequate notice.

"18. The Commission has no authority, under the provisions of the Federal Power Act, to regulate, control or fix any rates, charges, classifications, rules, regulations, practices or contracts of Respondents because there is no evidence of record which will support a finding that any existing rates, charges, classifications, rules, regulations, practices or contracts are unjust, unreasonable, or unduly discriminatory or preferential.

"19. The allocations of costs and revenues testified to by Commission Staff witness Davis will not support any findings with respect to the reasonableness of any rates, charges or classifications of Respondents, and such allocations have no support by the evidence of record.

"20. This proceeding should be dismissed.

* * *

"Assuming, without conceding, that the Commission has jurisdiction in this proceeding, it is requested that the following additional findings and conclusions be made:

"A. The total amount of original cost as of December 31, 1945, of the property of Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland (Transmission Company), is $36,605,700.08.

"B. The facts and conclusions stated in each of the original cost points in Respondents' brief are true and correct.

"C. The proper allowance for working capital is, at least, $977,160.

"D. The proper depreciation reserve balance as of December 31, 1945 is $6,000,000, which covers the depreciation actually existing in the property as of that date and an adequate margin of safety.

"E. There is no competent evidence of record to support the service-life assumptions of Commission Staff witness Roland.

"F. Deferred maintenance should be reflected in the annual charge for depreciation every year, with the deferred maintenance expense charged to the depreciation reserve when the expenditure is made.

"G. The proper annual allowance for depreciation and deferred maintenance for the property in service as of December 31, 1945 is $400,000, with an additional 2½% on net additions of depreciable property after 1945.

"H. The depreciation reserve should not be deducted from original cost in arriving at the rate base.

"I. If an investment rate base is to be used, it should be an undepreciated rate base with a 3% credit

to the consumers on the proper depreciation reserve balance, which as of December 31, 1945 was $6,000,000.

"J. If an investment rate base is to be used, the Commission must, in determining the fair return, give consideration to changing price levels in fixing the fair rate of return.

"K. In determining the fair return, the Commission must give consideration to changing price levels either in the fair rate of return or in the rate base.

"L. There is no evidence of record which will support a finding that any existing rates, charges, classifications, rules, regulations, practices or contracts are unjust, unreasonable, or unduly discriminatory or preferential.

"M. The rulings of the Trial Examiner, in the respects specified in Respondents' brief, were in error."

The substantial evidence in the record supports such findings and there is no substantial evidence in the record to justify the failure of the Commission so to find.

VI. The Petitioners do not waive but expressly reaffirm and renew each and all of their objections and exceptions to the jurisdiction of the Commission or the admission or exclusion of evidence, as shown in the record, including particularly (without limiting the generality of the foregoing) their objections and exceptions to the jurisdiction of the Commission and exceptions to the exclusion of evidence relating to present value or cost of reproduction or current cost of the Petitioners' property.

Respectfully submitted,

F. G. Awalt,
Raymond Sparks,
Daryal A. Myse,
Preston G. King, Jr.,
Counsel for Petitioners.

Dated at Washington, D. C.
January 28, 1949.

DISTRICT OF COLUMBIA, *ss.:*

The undersigned, being first duly sworn, states that he is counsel for the applicants in the foregoing application; that he has read said application and knows the contents thereof; and that all of the statements contained therein are true and correct to the best of his knowledge, information or belief.

(s) RAYMOND SPARKS.
Raymond Sparks.

Sworn to and subscribed before me, a notary public, in and for said District of Columbia, this 28th day of January, 1949.

(s) FLORA A. MYERS.

(SEAL)

My commission expires Oct. 14, 1953.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to:

HOWARD E. WAHRENBROCK, Assistant General Counsel;
and REUBEN GOLDBERG, Attorney,
Federal Power Commission,
Hurley Wright Building,
Washington 25, D. C.

CHARLES D. HARRIS, General Counsel,
The Public Service Commission of Maryland,
Munsey Building,
Baltimore, Maryland.

CHARLES E. THOMAS, Counsel, and ARTHUR J. DISKIN, Attorney,
Pennsylvania Public Utility Commission,
Harrisburg, Pennsylvania.

G. KENNETH REIBLICH, Counsel for
Consolidated Gas Electric Light and Power,
Company of Baltimore,
Baltimore, Maryland.

Dated at Washington, D. C., this 28th day of January, 1949.

(s) RAYMOND SPARKS.
Raymond Sparks.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Complaint Docket No. 14028

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

PENNSYLVANIA WATER & POWER COMPANY

and

SAFE HARBOR WATER POWER CORPORATION

ORDER.

By THE COMMISSION, SEPTEMBER 27, 1948:

This proceeding is an inquiry and investigation to determine the fairness, reasonableness and justness of the rates and charges of Pennsylvania Water & Power Company, and Safe Harbor Water Power Corporation, sometimes hereinafter referred to as PW&P and SHWP respectively.

On December 5, 1944, our order instituted the inquiry and investigation against PW&P. That order directed that the inquiry and investigation include consideration of the imposition of temporary rates under the provisions of Section 310 of the Public Utility Law, the act of May 28, 1937, P. L. 1053, as amended. Under authority of the Public Utility Law, a questionnaire containing 21 questions was directed to PW&P for answer. The answers were admitted into the record at the initial hearing held October 9, 1946. Subsequently, seven additional days of hearings were held at which further testimony was introduced by PW&P, and it completed its case in chief, except for possible redirect examination, at the hearing on September 19, 1947. The record then included well over 100 exhibits and 986 pages of oral testimony. The record includes evidence of original cost, book cost, reproduction cost, accrued depreciation, annual depreciation, operating revenues, operating ex-

penses, rate of return, and allocation of plant to the respective uses in serving the several customers.

PW&P submitted testimony and exhibits with respect to Susquehanna Transmission Company of Maryland, a wholly owned subsidiary, which owns the transmission facilities in Maryland used by PW&P, and also with respect to SHWP. The record as a whole portrays an operation conducted to a great extent on a joint basis by PW&P and SHWP. The operation of the two companies is so intertwined that efficient and just regulation required that SHWP be joined as a respondent in this proceeding. Accordingly, on October 6, 1947, we instituted an inquiry and investigation of Safe Harbor Water Power Corporation to determine the fairness, reasonableness and justness of that company's rates and charges. SHWP was joined as a respondent in this proceeding and the order directed that the inquiry include consideration of the imposition of temporary rates under the provisions of Section 310 of the Public Utility Law.

A hearing was scheduled on November 6 and 7, 1947, among other things, for the purpose of affording SHWP the opportunity of appearing and offering evidence in support of its burden of proof. However, no appearance was entered for SHWP. In lieu of that, the President of SHWP under oath made a statement of position with respect to SHWP to the effect that PW&P and Consolidated Gas Electric Light and Power Company of Baltimore (Baltimore Company) are the only stockholders of SHWP, each having equal voting power and that the Board of Directors of SHWP comprises 10 members, five being nominees of each of the two stockholders. It further appears from that statement that the stockholders have at this time irreconcilable differences concerning the position which SHWP should take with respect to our order of October 6, 1947, by which SHWP was made a respondent in this proceeding. Because of this statement in voting control between equal stockholders the statement points out that the respective

stockholders will petition us for permission as stockholders to intervene in this proceeding so that each stockholder may present its contentions and submit such evidence as it may consider necessary to protect the interests of SHWP.

The capital structure of SHWP consists of 200,000 shares of Class B voting common stock, 100,000 shares of which are owned by PW&P and 100,000 shares by Baltimore Company; and 100,000 shares of Class A non-voting common stock, all owned by Baltimore Company. All of these shares are of no par value and have a stated value of $30.00 per share.

PW&P is a Pennsylvania public utility owning and operating a hydro-electric plant at Holtwood, Lancaster County, on the Susquehanna River, and transmission facilities located in Pennsylvania. At the site of the hydro plant, the company also owns and operates a steam electric plant, coal for which is obtained by dredging from the pond of the hydro-electric plant. The hydro plant has a capacity of 104,000 kilowatts; the steam plant a capacity of 26,000 kilowatts. In 1946, 181 million kilowatt-hours were generated by steam and 629 million kilowatt-hours by hydro.

This development had its inception in construction studies made prior to 1905 in which year construction was begun. Commercial operation began in 1911. All of the property owned and operated by PW&P is located within Pennsylvania. In 1910 a wholly and (sic) [owned] subsidiary, Susquehanna Transmission Company of Maryland, hereinafter sometimes referred to as STCo, was created for the purpose of owning those transmission facilities utilized by PW&P in Maryland.

By 1914, eight of the generating units were in place with the final two being placed in 1924 bringing the hydro capacity to 104,000 KW. In 1924 and 1925 the steam electric generating plant was constructed.

The development at Safe Harbor had its inception in studies which began in 1916, culminating in the formation in 1930 of Safe Harbor Water Power Corporation, a Penn-

sylvania public utility, a combination of two predecessor companies formed in 1927. The plant of SHWP on the Susquehanna River, eight miles upstream from Holtwood, the site of the plant of PW&P, was constructed in 1930-1932 and placed in commercial operation in 1932. The plant has an installed capacity of 230,000 KW and in 1946 produced 877 million KWH.

PW&P itself, or through its wholly owned subsidiary STCo, owns all the transmission system connecting SHWP and PW&P with Metropolitan Edison Company at York, Pennsylvania Power & Light Company's lines leading to Harrisburg and Lancaster, Philadelphia Electric Company at Coatesville, Baltimore Company at Baltimore, Potomac Electric Power Company near Washington, D. C., and transmission facilities to provide service to The Pennsylvania Railroad Company in Pennsylvania and in Maryland. PW&P owns those transmission facilities in Pennsylvania, STCo owns those in Maryland.

PW&P has power contracts with Metropolitan Edison, Pennsylvania Power & Light and Philadelphia Electric. SHWP is likewise a party to those contracts with Pennsylvania Power & Light and Philadelphia Electric. PW&P, SHWP, Baltimore Company and Potomac Electric Power Company have a joint contract with Pennsylvania Railroad to provide certain of the railroad company's electric power requirements. PW&P has a contract with Baltimore Company to receive a guaranteed income which does not fluctuate with the amount of power delivered to Baltimore Company and others. PW&P and Baltimore Company have a similar contract with SHWP guaranteeing the latter company a fixed income.

In short, PW&P and SHWP sell power at wholesale to five customers. Four of these, namely, Metropolitan Edison, Philadelphia Electric, Pennsylvania Power & Light and Pennsylvania Railroad receive service within Pennsylvania. Pennsylvania Railroad and Baltimore Company receive service within the confines of Maryland.

The record contains estimates of reproduction cost for PW&P, STCo and SHWP, of the plant extant December 31, 1946, at average prices for the five year period 1942-1946. Estimates of "actual" depreciation against these reproduction cost estimates have likewise been submitted. Further, the record contains statements of original cost of property extant December 31, 1946 of the three companies, together with estimates of "actual" depreciation against such cost, and of "adequate" depreciation reserves. Cross-examination by Commission Counsel has not been completed on the testimony and exhibits adduced.

The record contains several exhibits and extensive testimony from which PW&P contends that a rate of return of 6.8 per cent on an undepreciated original cost rate base should be provided for PW&P and STCo, and that a rate of return of 6¼ per cent on such rate base should be provided for SHWP. However, Exhibit 82 shows a rate of return of 5.6 per cent on an undepreciated original cost rate base for SHWP. In calculating cost of service PW&P applies the rates of 6.8 per cent and 6¼ per cent to the respective undepreciated original cost rate base, but offsets the resulting amounts by a credit of 3 per cent on what it considers "adequate" depreciation reserves.

Exhibit 84 was presented at the hearing on September 19, 1947 to show cost of firm power service supplied by PW&P, STCo and SHWP to the three Pennsylvania customers above recited and Pennsylvania Railroad, within Pennsylvania. To arrive at such cost, the exhibit considers the operations of PW&P, STCo and SHWP in rendering service in Pennsylvania and Maryland as a coordinated system and from this system cost ascertains the cost of service to the several customers within Pennsylvania.

Exhibit 84 ascertains the rate base of the three involved companies using original cost as of December 31, 1946, adding thereto the net authorized major additions to be constructed in 1947-1948, and further adding allowances for working capital. The exhibit further contains esti-

mates of "adequate" depreciation reserve as of December 31, 1947. The information is summarized in Table I as follows:

Table I

Rate Base and Depreciation Reserve
(from Exhibit 84)

	PW&P ($1,000)	STCo ($1,000)	SHWP ($1,000)
Original Cost (Dec. 31, 1946)	30,941	5,595	30,240
Authorized Major Additions 1947-48	857	9	108
Adj. for Genl. & Intang. Plant	(162)	162	—
Total Original Cost	31,636	5,766	30,348
Working Capital	835	142	315
Total Rate Base	32,471	5,908	30,663
"Adequate" Depr. Resv. Dec. 31, 1947	5,602	976	2,727

The exhibit allocates the original cost of plant and depreciation as set out above in Table I on the principle of use as between, first, the specific facilities which are used by the five customers with the allocation to PRR divided between Pennsylvania and Maryland; and, second, all of the remaining plant being allocated to production plant and plant used commonly by all of the customers, described in short as Production and Common. With the plant and depreciation allocated to these respective uses the exhibit ascertains the required operating income, calculating a return of 6.8 per cent on the rate base for PW&P and STCo, and 6¼ per cent for SHWP, offset by a credit of 3 per cent on "adequate" depreciation reserve in all three in-

stances. This information is summarized in Table II as follows:

Table II

Allocation of Rate Base, Depreciation and Income
(from Exhibit 84)

	PW&P ($1,000)	STCo ($1,000)	SHWP ($1,000)
Rate Base Allocated to			
Production & Common	27,611	251	28,708
Penna. Customers	1,716	—	—
PRR in Penna.	1,056	125	1,383
in Md.	822	391	572
Baltimore Co.	1,266	5,141	—
Total Rate Base	32,471	5,908	30,663
"Adequate" Depreciation Reserve Allocated to			
Production & Common	4,981	35	2,553
Penna. Customers	189	—	—
PRR in Penna.	145	17	123
in Md.	113	54	51
Baltimore Co.	174	870	—
Total Reserves	5,602	976	2,727
Required Operating Income			
Production & Common	1,727	16	1,718
Penna. Customers	111	—	—
PRR in Penna.	68	9	82
in Md.	53	25	35
Baltimore Co.	81	323	—
Totals	2,040 (1)	373 (1)	1,835 (2)

Notes: (1) Return 6.8% on Rate Base, less credit of 3% on depreciation.

(2) Return 6.25% on Rate Base, less credit of 3% on Depreciation.

The Susquehanna River, across which the hydro plants of respondents are constructed, like all natural streams, is subject to the vagaries of rainfall with resulting variation in stream flow throughout the years. In a year of drought, when stream flow is low, the quantity of hydro energy which can be generated is correspondingly small; in periods of high river flow, due to higher than average rainfall, the quantity of hydro energy which can be generated is correspondingly high. Accordingly, it is necessary to fix the charges for service by respondents on the average river flow, that is upon a "normal" year.

Exhibit 84 accordingly estimates the capacity which is capable of being furnished to the several customers, and the energy, based on past experience, which the several customers require, and which is capable of being furnished. It is estimated that a total of 332 thousand KW of firm capacity can be supplied by the two respondents and ascribed to the several customers to meet their demands, as summarized in Table III as follows:

Table III

Capacity to Several Customers
(from Exhibit 84)

		1,000 KW Capacity Normal Year
Metropolitan Edison	27	
Philadelphia Electric	30	
Pennsylvania Power & Light	80	
Total		137
PRR in Pennsylvania		48
Total for Penna.		185
Baltimore Co. (incl. PRR in Md.)		147
Total Capacity		332

The firm energy which Exhibit 84 estimates can be furnished in a "normal" year is summarized in Table IV as follows:

Table IV

Energy to Several Customers
(from Exhibit 84)

		Million KWH of Firm Energy—Normal Year
Metropolitan Edison	113	
Philadelphia	158	
Pennsylvania Power & Light	349	
Total		620
PRR—in Pennsylvania		227
Total for Penna.		847
Baltimore Co. (incl. PRR in Md.)		826
Total Energy		1,673 (1)

Note: (1) In addition to this quantity of Firm Energy there is 100 million KWH of Interchange Energy delivered to Penna. Customers and 15 million KWH of Interchange Energy delivered to Baltimore Co. and received from Penna. Customers.

Based upon operating experience and present cost of operation, Exhibit 84 estimates the cost of operation in a "normal" year. With all inter-company transactions eliminated such costs total 11,548 thousand dollars and are summarized in Table V as follows:

Table V

Annual Costs

(eliminating inter-company transactions)

(from Exhibit 84)

	Normal Year Annual Cost ($1,000)
PW&P	
Operating Expenses	3,234
Depreciation Expense	354
Income Taxes	937
Operating Income (Table II)	2,040
Total for PW&P	6,565
STCo	
Operating Expenses	435
Depreciation Expense	72
Income Taxes	161
Operating Income (Table II)	373
Total for STCo	1,041
SHWP	
Operating Expenses	876
Depreciation Expense	352
Income Taxes	879
Operating Income (Table II)	1,835
Total for SHWP	3,942
Total for the three companies	11,548

These total annual costs are allocated in Exhibit 84 to production and common facilities, to special facilities utilized by the respective customers and to interchange power. These costs as appear in Exhibit 84 are summarized in Table VI, as follows:

Table VI

Allocation of Annual Costs—Normal Year (from Exhibit 84)

	FW&P ($1,000)	STCo ($1,000)	SHWP ($1,000)	Total ($1,000)	Adjusted Total ($1,000)
Production & Common					
Capacity	2,105	19	1,839	3,963(2)	3,963(2)
Energy	3,185	20	1,839	5,044(1)	5,016(1)
Special Facilities					
Penna. customers	246	—	—	246	246
PRR—in Penna.	167	20	185	372	372
PRR—in Md.	132	61	79	272	272
Baltimore Company	186	921	—	1,107	1,107
Interchange	544	—	—	544(1)	572(1)
Totals	6,565	1,041	3,942	11,548	11,548

Notes: (1) 10 million KWH of hydro and PW&P steam energy sold as interchange reduces 5,044 to 5,016(3) and increases 544 to 572.

(2) The 3,963 of capacity cost for 332 thousand KW from Table III above results in a firm capacity cost of $11.94 per KW per year.

(3) The 5,016 energy cost as above in foot note (1) for 1,673 million KWH as in Table IV above results in a unit cost of energy of 2.998 mills per KWH.

In making allocations of operating expense, depreciation expense, income taxes and operating income, the principle of use has been followed in Exhibit 84, at least as viewed by PW&P. Those elements of cost which relate to special facilities used directly by any one of the five customers of respondents have been so allocated. Likewise, costs directly attributable to interchange power have been so allocated. Such elements of cost as fuel and purchased power have been allocated directly against energy costs. All remaining costs have been allocated to production and common plant and divided 50-50 between capacity and energy costs. With the principles which have been used in the preparation of Exhibit 84 we find ourselves in general agreement, but in prescribing temporary rates it is unnecessary for us to pass upon each individual allocation in particular.

The several elements of cost of service derived in Exhibit 84 are summarized in Table VI above, and these costs represent the combined cost of PW&P, STCo and SHWP for all service rendered by those companies in Pennsylvania and Maryland. We now direct our attention to that service rendered by respondents within Pennsylvania alone. This service covers the special facilities and capacity and energy furnished to Metropolitan Edison, Pennsylvania Power & Light, Philadelphia Electric and Pennsylvania Railroad. The cost of the service furnished these four customers within Pennsylvania in a normal year as set out in Exhibit 84, is summarized in Table VII as follows:

Table VII
Cost of Service Within Pennsylvania
(from Exhibit 84)

		Normal Year Annual Cost ($1,000)
Firm Power		
Pennsylvania Customers		
Special Facilities (Table VI)	246	
Capacity (Tables III & VI)		
137,000 KW @ $11.94	1,636	
Energy (Tables IV & VI)		
620 million KWH @ 2.998 mills	1,859	3,741
PRR		
Special Facilities (Table VI)	372	
Capacity (Tables III & VI)		
48,000 KW @ $11.94	573	
Energy (Tables IV & VI)		
227 million KWH @ 2.998 mills	681	1,626
Total		5,367

The cost of service being furnished by respondents within Pennsylvania for a normal year as determined in

Exhibit 84, and shown above in Table VII, totals 5,367 thousand dollars. Under existing tariffs respondents' customers are paying for this service, in a normal year, a total of 6,011 thousand dollars. Accordingly, based on the derivations in Exhibit 84, revenues exceed costs by 644 thousand dollars. This information is summarized in Table VIII as follows:

Table VIII

Comparison of Revenues and Costs
within Pennsylvania
(from Exhibit 84)

	NORMAL YEAR		
	Revenues (Present Rates) ($1,000)	Annual Cost (Table VII) ($1,000)	Excess ($1,000)
Firm Power Pennsylvania			
Customers	4,197	3,741	456
PRR (in Penna.)	1,814	1,626	188
Total	6,011	5,367	644

From this it would appear that existing revenues for service within Pennsylvania, as furnished by respondents, should be reduced 644 thousand dollars, annually, and the respondents would still be provided a return of 6.8 per cent on the undepreciated original cost rate base of the facilities utilized by PW&P and STCo in furnishing service within Pennsylvania and a return of 6¼ per cent on the undepreciated original cost rate base of facilities utilized by SHWP in furnishing service within Pennsylvania; such amounts of return being offset by 3 per cent on what PW&P considers to be "adequate" depreciation reserves applicable to such original cost figures. Such reduced revenues, in addition to providing the above described amounts of return, would fully reimburse the three companies for all elements of operating expenses, depreciation expense

and income taxes attributable to the service furnished within Pennsylvania.

We are here in this order fixing temporary rates in accordance with Section 310 of the Public Utility Law. The orders by which this proceeding was instituted specifically included consideration of the imposition of such temporary rates.

This proceeding has been pending since 1944, and the record now contains adequate information upon which we can base temporary rates. Exhibit 84 itself indicates, on an undepreciated original cost rate base, that a reduction in charges should be made for service rendered in Pennsylvania. To delay until the final completion of the record in this proceeding works an injustice upon the customers in Pennsylvania taking service from respondents and accordingly the imposition of temporary rates is indicated and is in order.

Section 310 of the Public Utility Law provides that we may, if it is our opinion that the public interest so requires, prescribe temporary rates pending final determination of a rate proceeding, and that such temporary rates shall

> "be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property (when first devoted to public use) of such public utility, used and useful in the public service, and if the duly verified reports of such public utility to the commission do not show such original cost, less accrued depreciation, of such property, the commission may estimate such cost less depreciation and fix, determine, and prescribe rates as hereinbefore provided."

From this it is noted that temporary rates are authorized to provide a return of as low as 5 per cent upon depreciated original cost of the physical property used and useful in the public service. PW&P contends for a return

of 6.8 per cent on undepreciated original cost rate base for PW&P and STCo and 6¼ per cent on undepreciated original cost rate base for SHWP, partially offset however by a credit of 3 per cent on what PW&P contends are "adequate" depreciation reserves applicable to original cost. While contending for these rates of return, Exhibit 82 sets forth a return on undepreciated original cost of SHWP of but 5.6 per cent. For the purposes of fixing temporary rates, we shall provide a return of 6 per cent on the depreciated original cost rate base as hereinafter defined. In fixing such a return we are well above the minimum prescribed in Section 310 of the Public Utility Law quoted above in part.

The depreciation reserves on the books of PW&P and STCo approximating nine million dollars are described in the record as ". . . an amount which has been accumulated in the depreciation reserve out of the Companies' past operations." Opposed to this PW&P estimates that an "adequate" reserve for PW&P and STCo as of December 31, 1947 totals six million dollars of which 5,160 thousand dollars is for PW&P and 840 thousand dollars is for STCo. For SHWP the book depreciation reserve of 2,399 thousand dollars is considered by PW&P to be an "adequate" reserve as of December 31, 1946. As set out above in Table I, these "adequate" reserves become as of December 31, 1947, 5,602 thousand dollars for PW&P, 976 thousand dollars for STCo and 2,727 thousand dollars for SHWP.

While PW&P contends that the depreciation reserves on the books of PW&P and STCo are more than is considered adequate, they are stated to be something which has been accumulated out of the operations of those two companies. To this extent the actual reserve represents a return of capital by the customers through the medium of payment of charges for services received from the utilities. The same comment would appear to apply to the book reserve of SHWP. These are the reserves which appear on

the books of respondents and STCo and with respect to respondents are the figures in the annual reports of those utilities to us. However, at this time we shall not resolve the question of accrued depreciation but shall use the "adequate" reserves as contended for by PW&P, rather than the book reserves.

The original cost of PW&P and SHWP as set out in the record has not been reviewed by us or accepted for accounting purposes under our original cost requirements. Accordingly, we are in no position to state whether the original cost is as it will be determined finally. However, we shall use the figures as submitted by PW&P, which are summarized above in Table I, and we will combine them with the "adequate" depreciation reserves as of December 31, 1947 and as in Table I, in the preparation of Table IX which follows. In this table we allow a return of 6 per cent on the depreciated original cost rate base.

Table IX

Allocation of Rate Base, "Adequate" Depreciation Reserves and Return
(by Commission)

	PW&P ($1,000)	STCo ($1,000)	SHWP ($1,000)
Undepreciated Original Cost Rate Base Allocated to			
Production & Common	27,611	251	28,708
Penna. Customers	1,716	—	—
PRR in Penna.	1,056	125	1,383
in Md.	822	391	572
Baltimore Co.	1,266	5,141	—
Totals	32,471	5,908	30,663

Exhibit E to Petition for Review 357

"Adequate" Depreciation Reserves Allocated to			
Production & Common	4,981	35	2,553
Penna. Customers	189	—	—
PRR in Penna.	145	17	123
in Md.	113	54	51
Baltimore Co.	174	870	—
Totals	5,602	976	2,727
Return (1)			
Production & Common	1,358	13	1,569
Penna. Customers	92	—	—
PRR in Penna.	55	6	76
in Md.	42	20	31
Baltimore Co.	65	257	—
Totals	1,612	296	1,676

Note: (1) Return is 6% on Original Cost less "Adequate" Depreciation Reserves.

Because of reduced return occasioned by a lower rate base and a lower rate of return, we have decreased the allowances for income taxes as appear in Exhibit 84. With respect to the subject of income taxes it is to be noted that at the present time, by reason of the form of contract which respondents have with Baltimore Company, Federal Income Tax is at a lower rate than would be experienced if the companies did not have this contractual arrangement. The Federal Income Taxes set out in Column 6, page 5 of Exhibit 84 are based upon the higher rate. While we have calculated the Federal Income Taxes at the higher rate it is to be noted that such taxes will not be experienced while the present contracts with Baltimore Company continue in force. We leave this point for the final determination in this proceeding.

Using the same operating expenses and depreciation expense for the three companies as in Exhibit 84 and summarized above in Table V, the income taxes as above described and the return as set out in Table IX, we summarize below in Table X, eliminating all intercompany transactions, the annual cost of furnishing service by respondents and STCo.

Table X

Annual Costs

(*eliminating intercompany transactions*)

(by Commission)

	Normal Year Annual Cost ($1,000)
PW&P	
Operating Expenses	3,234
Depreciation Expense	354
Income Taxes	661
Return (Table IX)	1,612
Total for PW&P	5,861
STCo	
Operating Expenses	435
Depreciation Expense	72
Income Taxes	112
Return (Table IX)	296
Total for STCo	915
SHWP	
Operating Expenses	876
Depreciation Expense	352
Income Taxes	776
Return (Table IX)	1,676
Total for SHWP	3,680
Total for the three companies	10,456

Following the same allocation principles used in Exhibit 84, the annual costs as shown in Table X are allocated to the respective uses made of the several parts of the plant of respondents and STCo with resultant figures as summarized below in Table XI. It is noted that compared with capacity costs of $11.94 per KW per year and energy costs of 2.998 mills per KWH as in Exhibit 84, summarized above in Table VI, our findings are $10.65 per KW per year and 2.742 mills per KWH. Costs for special facilities are reduced in our findings as compared with those in Exhibit 84 and as in Table VI.

Table XI

Allocation of Annual Cost—Normal Year

(by Commission)

	PW&P ($1,000)	STCo ($1,000)	SHWP ($1,000)	Total ($1,000)	Adjusted Total ($1,000)
Production & Common					
Capacity	1,805	15	1,717	3,537(2)	3,537(2)
Energy	2,883	17	1,716	4,616(1)	4,588(1)
Special Facilities					
Penna. Customers	211	—	—	211	211
PRR in Penna.	145	17	174	336	336
in Md.	114	53	73	240	240
Baltimore Company	159	813	—	972	972
Interchange	544	—	—	544(1)	572(1)
Totals	5,864	915	3,680	10,456	10,456

Notes: (1) 10 million KWH of hydro and PW&P steam energy sold as interchange reduces 4,616 to 4,588(3) and increases 544 to 572.

(2) The 3,537 of capacity cost for 332 thousand KW from Table III above results in a form (sic) [firm] capacity cost of $10.65 per KW per year.

(3) The 4,588 energy cost as above in footnote (1) for 1,673 million KWH as in Table IV above results in a unit cost of energy of 2.742 mills per KWH.

These are the costs of rendering service by the consolidated system of respondents and STCo. In applying these costs to the service within Pennsylvania to the Pennsylvania customers, namely, Metropolitan Edison, Penn-

sylvania Power and Light and Philadelphia Electric, and Pennsylvania Railroad, the following results, as set out in Table XII. These costs as determined by us of 4,841 thousand dollars compare with the costs as in Exhibit 84 summarized above in Table VII of 5,367 thousand dollars.

Table XII

Cost of Service within Pennsylvania
(by Commission)

		Normal Year Annual Cost ($1,000)
Firm Power		
Pennsylvania Customers		
Special Facilities (Table XI)	211	
Capacity (Tables III & XI)		
137,000 KW @ $10.65	1,460	
Energy (Tables IV & XI)		
620 million KWH @ 2.742 mills	1,700	3,371
PRR		
Special Facilities (Table XI)	336	
Capacity (Tables III & XI)		
48,000 KW @ $10.65	511	
Energy (Tables IV & XI)		
227 million KWH @ 2.742 mills	623	1,470
Total		4,841

A comparison of the revenues for services rendered within Pennsylvania under present contracts and the foregoing costs as determined by us is summarized as follows in Table XIII from which it appears that revenues exceed costs by 1,170 thousand dollars per year for a normal year.

Table XIII

Comparison of Revenues and Costs within Pennsylvania
(by Commission)

	NORMAL YEAR		
Firm Power	Revenues Present Rates ($1,000)	Annual Cost (Table XII) ($1,000)	Excess ($1,000)
Pennsylvania Customers	4,197	3,371	826
PRR (in Penna.)	1,814	1,470	344
Total	6,011	4,841	1,170

Accordingly, we shall direct respondents to file new tariffs for the service rendered by them within Pennsylvania designed to produce for such service in a normal year a total of $4,841,000.

The tariffs shall contain specific charges for special facilities to the respective three Pennsylvania customers totaling 211 thousand dollars, annually, with appropriate clauses providing for changes up or down to meet changes in depreciated original cost rate base of plant utilized for the respective customers and changes in direct operating expenses with respect to those facilities. For Pennsylvania Railroad (in Pennsylvania) the tariffs shall include specific charges for special facilities totaling 336 thousand dollars, annually, apportioned between PW&P, STCo and SHWP as shown above in Table XI for the facilities specifically used in rendering service to the railroad in Pennsylvania, with clauses to modify these figures up or down to meet changes in depreciated original cost rate base of facilities so used and changes in actual operating expenses with respect to those facilities. The tariffs shall be designed to result in an annual charge of $10.65 per KW of demand of the three Pennsylvania customers and Pennsylvania Railroad (in Pennsylvania) for the respective capacities shown in Exhibit 84 for a normal year, and to

result in a charge of 2.742 mills per KWH for the energy for a normal year as in Exhibit 84.

Of the charges made for the service within Pennsylvania, the charges for the special facilities shall be apportioned to PW&P, STCo and SHWP in accordance with the figures set out above in Table XI adjusted in future years with modifications in accordance with the formula used in the preparation of that table.

With respect to capacity charges, distribution among the participants will be 51.03 per cent to PW&P, 0.42 per cent to STCo and 48.55 per cent to SHWP. For energy charges distribution among the participants will be 62.46 per cent to PW&P, 0.37 per cent to STCo and 37.17 per cent to SHWP. These ratios among the three companies, ascertained from Table XI above, represent the proportions attributable to a normal year. These proportions will vary from year to year, but the formula by which they are determined shall be the same formula as used by us in the preparation of the allocation shown in Table XI.

In fixing the temporary rates, as hereinbefore set out, there are several features of this proceeding which at this time we have not resolved. In summary, these features are (a) the original cost of PW&P and SHWP used in this proceeding is as submitted by PW&P and as yet no determination has been made as to whether it meets our original cost requirements. The final determination may be somewhat lower than as contended for by PW&P. (b) PW&P contends for "adequate" depreciation reserves which figures are $3,420,000 less than the book depreciation reserves as of December 31, 1947. (c) We have used a rate of return of 6 per cent on a depreciated original cost rate base. This rate is well above the 5 per cent minimum fixed by The Public Utility Law for temporary rates but is not to be considered the rate which we will finally determine. (d) While we have accepted operating expenses as contended for by PW&P for the three companies in ascertaining system costs, we leave for final determination whether

such operating expenses contain higher than average charges. (e) Likewise have we accepted the depreciation expense as is estimated by PW&P and leave for final determination the propriety of the several amounts. (f) We have accepted the estimates for Federal Income Taxes based upon the filing of individual returns by PW&P and SHWP even though this allowance is upwards of 220 thousand dollars, annually, more than the companies experience under their present contractual arrangement with Baltimore Company.

Thus, it is apparent that temporary rates herein prescribed are well above the minimum required by the Public Utility Law, will assure respondents ample funds to enable them to provide adequate service to their several customers in Pennsylvania and are at such a level as to be considered fair; THEREFORE

IT IS ORDERED: That on or before November 1, 1948, Pennsylvania Water & Power Company and Safe Harbor Water Power Corporation file, to become effective November 15, 1948, tariffs designed to carry into effect our order as above set out, namely, to produce within a normal year the revenue of $4,841,000 for firm power service within Pennsylvania as in Table XII above, together with complete detailed supporting explanation to show that the tariffs will comply with our order.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

(signed) JOHN SIGGINS, JR.
Chairman

ATTEST:

(SEAL)

(signed) J. A. WALTER
Secretary

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Complaint Docket No. 14028

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

PENNSYLVANIA WATER & POWER COMPANY

and

SAFE HARBOR WATER POWER CORPORATION

ORDER

By THE COMMISSION, SEPTEMBER 27, 1948:

The Commission on December 5, 1944 instituted an inquiry and investigation into the rates of Pennsylvania Water & Power Company (PW&P) at Complaint Docket No. 14028. Hearings were held in that proceeding and testimony was taken which indicated a coordinated operation and rendering of joint services by PW&P and Safe Harbor Water Power Corporation (SHWP) to their several customers.

Thereafter, on October 6, 1947, the Commission issued an inquiry and investigation into the rates of SHWP and joined SHWP as a respondent at Complaint Docket No. 14028. Hearing was held November 6, 1947 to give SHWP an opportunity to be heard. At the hearing on November 6, 1947, the president of SHWP appeared and recited the division of voting control between PW&P and Consolidated Gas Electric Light and Power Company of Baltimore (Baltimore Company), and stated that the Board of Directors of SHWP consisted of 10 members, five of whom were nominees of PW&P and five nominees of Baltimore Company, and that irreconcilable differences between the two parent companies made it impossible for SHWP to take any affirmative action at that time.

At said hearing Baltimore Company filed a petition to intervene as a stockholder of SHWP and presented therewith, conditional upon allowance of such intervention, a motion to dismiss the proceedings as to SHWP for want of jurisdiction. By order of May 25, 1948, the Commission permitted Baltimore Company to intervene for the sole purpose of questioning this Commission's jurisdiction and fixed July 16, 1948, for filing of briefs and oral argument. At said oral argument, counsel for PW&P appeared in opposition to the motion to dismiss. Thus, the matter is now before the Commission on the question of our jurisdiction over the rates and charges of SHWP.

Baltimore Company's motion to dismiss is based upon two principal arguments

1. The Federal Power Commission instituted its own proceeding against the rates and charges of SHWP on September 1, 1944, and, on November 4, 1946 issued its order reducing said rates and charges. SHWP has presently pending an appeal from said order taken to the Circuit Court of Appeals of the United States for the Third Circuit, which appeal has not been heard or disposed of, and the FPC order is presently in full force and effect.

2. The exercise by the FPC of jurisdiction over the rates and charges of SHWP excludes any state regulatory power or jurisdiction thereover so long as the exercise of such jurisdiction by the FPC is in full force and effect, and the courts of Pennsylvania and a fortiori the Public Utility Commission have no power to review such FPC action either directly or collaterally.

In support of these contentions, Baltimore Company's brief contains references to various cases, which, in our opinion, do not control the present situation.

We do not believe that a sovereign state must appear before a federal administrative agency to determine whether its law or a related federal law governs a given situation. Nor can the decision of a federal administra-

tive agency in interpreting a state statute be considered binding upon the state. We feel that these principles of law are basic and founded in the long established division of powers between state and federal governments.

We have asserted jurisdiction over the rates of SHWP and PW&P according to the powers and duties imposed upon us by the Pennsylvania Public Utility Law. The field in which we have acted is intrastate commerce, and the FPC cannot, by its mere assertion, oust our jurisdiction. The Federal Power Act does not confer such jurisdiction upon the FPC, and it would be unconstitutional if it did so. We are of the opinion that the attempt of the FPC to exercise jurisdiction over SHWP does not deprive this Commission of its jurisdiction, nor does it prevent us from exercising jurisdiction over the rates and charges of SHWP in our own proceeding.

SHWP was created under the laws of the Commonwealth of Pennsylvania. On February 11, 1929, at Application Docket No. 17675, the Pennsylvania Public Service Commission issued a certificate of public convenience approving the incorporation, organization and creation of Safe Harbor Water Power Company (sic) [Corporation] for the purpose of supplying, storing and transporting water and water power for commercial and manufacturing purposes in the Township of Manor, Lancaster County, Pennsylvania. On December 23, 1929, the Commission issued a certificate of public convenience at Application Docket No. 21579, approving the consolidation and merger of Safe Harbor Water Power Company [Corporation] and Chanceford Water Power Corporation, forming a new corporation to be known as Safe Harbor Water Power Corporation.

Following the issuance of the aforementioned certificate of public convenience, SHWP was granted authority by the Public Service Commission to acquire land located in York and Lancaster counties, Pennsylvania, by eminent domain proceedings, in some 49 separate cases.

Subsequently, the Public Service Commission approved several transactions involving the sale of real estate owned by SHWP to various parties, and the Public Service Commission, further, gave permission to SHWP to keep its books, records and accounts in its office in Baltimore, Maryland. SHWP has filed annual reports with this Commission and its predecessor, the Public Service Commission, continuously since the year 1930. It has paid annual assessments, commencing from the time said assessments were first begun by the Public Utility Commission in 1937.

It has kept its tariffs on file in accordance with Commission rules. As a certificated public utility, SHWP has complied with the various rules and regulations of the Commission with respect to its rates and charges and the filing of various reports, tariffs and other data required from time to time.

SHWP owns and operates a hydroelectric power development at Safe Harbor, Pennsylvania, on the Susquehanna River. It is solely a hydroelectric development, having a presently rated capacity of 230,000 kw. Its plant is electrically connected only to the primary inter-connected transmission system of PW&P at Safe Harbor. SHWP's stock has been owned only by PW&P and Baltimore Company, with 50 per cent of the voting stock being owned by each of said companies.

From a review of the facts on record, it is apparent that SHWP is a Pennsylvania Corporation with all of its facilities in Pennsylvania, filing tariffs with this Commission and rendering electric services in Pennsylvania. Furthermore, it is clear that the electric services of SHWP rendered to Pennsylvania customers for resale in Pennsylvania and directly to the Pennsylvania Railroad Company in Pennsylvania is intrastate commerce. Although SHWP admittedly does interstate as well as intrastate business, the two types of service are readily separable for the pur-

poses of regulation. Ample evidence appears of record for us to make such separation.

The record discloses an integrated and coordinated system operated by PW&P and SHWP, and since these unified operations result in intrastate commerce in Pennsylvania this Commission is bound to exercise jurisdiction over such intrastate activities.

From its inception, SHWP has been subject to the jurisdiction of this Commission as fully and completely as could be possible under any circumstances. Any attempted exercise of jurisdiction by any other agency, whether state or federal, over the rates and charges of SHWP, could have no effect to oust the jurisdiction of this Commission. The rates and charges for the output of electrical energy sold in Pennsylvania by SHWP are subject to our jurisdiction.

After consideration of the motion to Baltimore Company to dismiss the proceedings as to Safe Harbor Water Power Corporation, we are of the opinion that the said motion should be denied; THEREFORE,

IT IS ORDERED: That the motion of Consolidated Gas Electric Light and Power Company of Baltimore to dismiss the proceedings at Complaint Docket No. 14028 against Safe Harbor Water Power Corporation be and is hereby denied,

PENNSYLVANIA PUBLIC UTILITY COMMISSION

(signed) John Siggins, Jr.
Chairman

ATTEST

(Seal)

(signed) J. A. Walter
Secretary

EXHIBIT F TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds and Harrington Wimberly.

January 31, 1949

In the Matter of
Pennsylvania Water & Power Company } Docket No. IT-5915

ORDER GRANTING STAY.

On January 18, 1949, Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland, respondents in the above-entitled proceeding, filed an application for a stay of the effective date of the Commission's order entered January 4, 1949, and issued January 5, 1949. On January 25, 1949, the Public Service Commission of Maryland advised this Commission of its opposition to respondents' application.

The respondents request that the effective date be stayed "for a period of thirty days from February 1, 1949, or until such time as the Commission shall act upon the Application for Rehearing which will be filed" by respondents, "plus an additional period of sixty days thereafter, being the statutory period allowed" for respondents "to obtain a review" of the Commission's order.

Subsequently, on January 28, 1949, the respondents filed their application for rehearing as to the order issued January 5. That application we retain under consideration at this time.

The rate reduction was made effective February 1, 1949. Respondents now allege that they will "sustain and

suffer serious, substantial, and irreparable injury, loss and damage" unless the operation of the Commission's order is stayed. The "injury, loss, and damage" refers to the difference between the revenues respondents will receive under the terms of the Commission's order and the revenues respondents would receive if the Commission's order were not effective.

Respondents further assert that in the event the Commission's order is set aside respondents will have lost forever the revenues they would have been authorized to collect at the higher rates. Respondents say that this result will follow because "the Commission has no authority and can make no provision for the recouping by and reimbursement to" the respondents "of the very substantial loss" they will have sustained "without means of recouping such loss."

We do not agree with this view which implies that we may only stay our orders unconditionally. If that were so, that fact would be a sound reason for denying a stay because such a stay would permit respondents to continue to charge rates which we have held to be unreasonable and to retain the excessive revenues as though our order had never been entered, even though it may ultimately be affirmed by the courts. To do that would make our use of the stay power an instrument for accomplishment of the very result which it was the purpose of the Act to prevent when it provided in Section 205 that such rates as are here involved "shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful" and in Section 206 that we should determine the just and reasonable rate "to be thereafter observed and in force." We believe that our power to grant or deny a stay necessarily carries with it the power to grant the stay on such conditions as will maintain the status quo and save respondents harmless if and to the extent our order may be set aside or modified, and protect the interests of those entitled to the benefits of the rate

reduction from and after February 1, 1949, if and to the extent our order is affirmed.

Furthermore we think it clear, and we find that the condition hereinafter prescribed is necessary and appropriate under Section 309 of the Federal Power Act to carry out the provisions of that Act.

The Commission therefore *orders:*

The effective date provided for in the order issued January 5, 1949, be and the same hereby is stayed, but only upon the condition hereinafter provided, pending expiration of the period in which the application for rehearing thereon may be acted upon and petition for judicial review may be filed. Such stay shall be upon condition that the difference between the payments received by respondents under existing rates or arrangements and those which would be required under the Commission's order issued January 5, 1949, during the period of the stay, together with earnings thereon, shall be clearly earmarked, separately accounted for and retained by respondents in a segregated reserve solely for the purposes hereinafter specified. If and to the extent that the Commission's order issued January 5 shall finally become effective, respondents shall pay such difference, together with the earnings thereon, to customers, in the proportions their payments would have been reduced if the Commission's order had not been stayed, for the benefit of the ultimate consumers, or such other persons as may be shown to be entitled thereto. If and to the extent that the Commission's order shall be modified or set aside on rehearing or review, such difference, together with the earnings thereon, shall be freed of the restrictions hereby imposed.

By the Commission.

(Signed) LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

(Seal)

Date of Issuance: January 31, 1949

EXHIBIT G TO PETITION FOR REVIEW.

[1]* UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matter of Pennsylvania Water & Power Company	Docket No. IT-5915

OPINION NO. 173-A

By THE COMMISSION:

Applications for rehearing on our Opinion No. 173 and order, issued January 5, 1949, were filed January 28, 1949, by the Respondents, Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland, and on January 31, 1949, by the Intervenor, Pennsylvania Public Utility Commission. The Respondents' application objects to virtually every statement, finding and requirement of that opinion and order. With few exceptions, those objections simply repeat the arguments advanced during the course of the hearings and in the briefs filed subsequently to the close of the hearings. No useful purpose would be served in setting them forth here again. We considered them carefully and fully before issuing our original opinion and order and we do not believe they offer any basis for a rehearing.

The objections presenting new points have also received our careful consideration. Thus Respondents properly call our attention to the fact that we omitted to find, in the language of Sections 20 and 206, that Penn Water's existing rates and charges to Pennsylvania Power & Light Company, Philadelphia Electric Company and Metropolitan Edison are "unjust" and "unreasonable". That was an inadvertence as indicated by the fact that, in sub-

* Figures in brackets represent page numbers of opinion in typewritten form.

stance, we found the existing rates and charges to those Pennsylvania customers (Finding No. 34) exceed a reasonable cost of service. For that cost of service [2] includes an allowance of a fair return, based upon the fair rate of return, which we found to be 5¼%. We will, accordingly, amend our order issued January 5, 1949, to include this finding in specific statutory terms.

None of the other new points made by Respondents has substantial merit, although one of them may warrant a further modification of our order by inclusion of an additional finding.

Thus Respondents assert that the Commission "has no jurisdiction, authority, or power to issue and enforce" its order issued January 5, 1949, because the order requires the new schedule of rates and charges "to be effective within a period of less than thirty days from the date of issuance of such Order, contrary to the requirements of Section 20 of the Federal Power Act insofar as such Section makes applicable the provisions of Section 15 (2) of the Interstate Commerce Act"; and because, it is contended, the hearing and the Commission's findings regarding the unreasonableness of Penn Water's rates and charges are not in accordance with the requirements of Section 15 (1) of the Interstate Commerce Act insofar as the provisions thereof are made applicable by Section 20. (Application for Rehearing, pp. 3, 7-8) Thus by a technicality Respondents seek to postpone yet longer the already long overdue rate reduction.

Not only are these objections inapplicable to the extent that our rate order is viewed as based on our rate-making authority Under Part II of the Act, but they are also without merit even to the extent that our order is viewed as based upon Part I of the Act. [3] *Pennsylvania Power & Light Co. v. Federal Power Commission*, 139 F. 2d 445, 453 (C. C. A. 3), *cert.* denied 321 U. S. 798; *Safe Harbor Water Power Corporation v. Federal Power Commission*, 124 F. 2d 800 (C. C. A. 3), *cert.* denied 316 U. S.

663. In the first case, the Court held that a licensee has no vested right in a procedural provision of Part I of the Act, and in the second, that the review provisions of Part I were repealed by the later enactment of the conflicting review provisions of Part II. While Section 15 (2) of the Interstate Commerce Act, referred to in Section 20 of the Federal Power Act, provides that orders shall take effect within not less than thirty days, all orders of this Commission (including those issued under Section 20) are now governed by the subsequently enacted Section 309, which provides:

> "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe."

Furthermore, insofar as the objections stated above rest on the provisions of Section 15 (1) of the Interstate Commerce Act, we fail to perceive the significance of the objection or that the practice and procedure followed in this case were not in accord with the terms of that Section. The procedural provisions of that Section, insofar as they appear to be relevant, only stipulate that a rate order may be entered "after full hearing" and appropriate findings. Respondents have had ample notice of the issues and a full hearing with opportunity to adduce evidence, cross-examine and argue. They also have had full opportunity to point out specifically any deficiencies [4] in our findings. If some other objection is intended, Respondents' references to Section 15 (2) and 15 (1) are too unspecific, vague and indefinite to be susceptible to any more detailed consideration, and in either event, must be over-ruled.

In their Application for Rehearing, Respondents also allege "that since the record before the Commission was closed there have been substantial changes in the operations and contracts of Petitioner Penn Water, * * * so that the bases for the said Order and for many of the findings, conclusions, and requirements * * * are destroyed and * * * are not in accord with the facts and the law" (page 2

of Application for Rehearing). On the basis of the claimed changes exception is taken to many of the Commission's statements and findings as no longer true, if ever true. (E. g., see pages 46, 47, 58 of Application for Rehearing.)

More particularly it is alleged in the Petition for Rehearing that since the record has been closed the agreement of December 31, 1927, as supplemented, between Penn Water and Baltimore Company has been terminated by Penn Water; that Penn Water has notified Baltimore Company that it was ceasing to receive from the latter and ceasing to pay for any electric energy or capacity generated in Maryland, or elsewhere, and transmitted across the Maryland State line into Pennsylvania; that the operations of the Respondents were being changed to effect that purpose; that if given the opportunity they will prove the fact of such termination; that the contract was null, void and unenforceable; that Baltimore Company has committed material [5] breaches of the contract which justify its cancellation; and that these matters are now in litigation between Penn Water and Consolidated on Penn Water's complaint for declaratory judgment and other relief before the District Court of the United States for the District of Maryland (pages 10-11, 17-18 of Application for Rehearing).

Similarly, it is alleged that since the record in this proceeding has been closed, Penn Water has notified Safe Harbor and Baltimore Company that the three-party contract of June 1, 1931, between the aforesaid is of no effect, null, void and unenforceable. Respondents state that if afforded the opportunity on rehearing, they will prove the fact of such notification; that the contract was null, void and unenforceable, and that Penn Water credits to the account of Safe Harbor an appropriate and reasonable division of revenues received from Pennsylvania customers served jointly by Penn Water and Safe Harbor, which credits have increased substantially the amounts Penn Water credits or pays to Safe Harbor (pages 19-20, 39, 45 of Application for Rehearing).

The contracts which Penn Water by the *ex parte* action thus alleged has sought to terminate are the fifty-year foundation contracts referred to in our former opinion. Under those contracts the steam and hydroelectric generating capacity and transmission facilities of Baltimore Company, Penn Water, Susquehanna, and Safe Harbor, were designed and constructed, and for up to 17 years and more operated, so as to achieve close integration and coordination [6] among all of the companies. We pointed out in our opinion that such pooling of Baltimore Company's steam capacity with the hydro capacity of the other companies resulted in a much more economical supply of the combined power requirements of all the companies, including supply to Pepco in the Washington area.[1]

Penn Water has consistently in its representations to its stockholders and to regulatory authorities explained and emphasized the results and importance of the pooling arrangements. Thus in its 1941 Report to Stockholders it said:

> "Coordinated operation of this pool of power means that each member not only has available in emergency the combined resources of the interconnected systems, but also derives through daily and seasonal interchange arrangements the benefit which arises from the use of the most economic sources of generation for supplying the power requirements of the pool. A further benefit flows from the possibility of planning generating-capacity additions of the most economic type and size with consequent reduction in the amount of unused reserve capacity that would occur were the systems uncoordinated. Thus the regional transmission network of the Pennsylvania Water & Power Company has multiple purposes, and energy continually flows in, across, and out of it as

1. See Opinion No. 173, p. 17, for some of the most pertinent language from one of the contracts.

the needs of the interconnected members develop from minute to minute and day to day."

• • •

"The System had its origin 32 years ago.

"It arose from the necessity of finding a solution to the problem of providing, without large and expensive reservoirs, a uniform supply of power while utilizing the unharnessed energy of a drainage [7] area subject to severe droughts and floods. The average daily flow at Holtwood has varied from as little as 1700 cubic feet per second up to 756,000 cubic feet per second since the Company began operations. Nevertheless, out of this difficult situation, an important and reliable power pool has been developed.

"The answer to the problem was combined hydro and steam supply; not the substitution of hydro for steam, but from the outset the integration and coordination of hydro and steam in the planning for the capacity needed and in the operation and maintenance of the facilities."

• • •

"Favorably located in regard to harnessing the river, the Holtwood plant is also strategically situated for serving through short transmission lines the major load centers of one of America's chief industrial and agricultural regions.

"Through long range planning and cooperation with its customers—cooperation which found expression in the design as well as the operation of the plants—the Company so developed its transmission system that from the original transmission line to provide standby steam or supplementary hydro power, as the needs might be, there evolved a comprehensive network supplying power and interchanging power on a regional basis for utility companies supplying a

population of 2,600,000 in the 4,600 square mile area served by the interconnected companies.

"This network is wholly within the two adjoining states of Pennsylvania and Maryland, the supply to Washington being over an interconnection with the Potomac Electric Power Company's own system near the District of Columbia line."

Repeated statements to the same effect have been made by Penn Water's officers and witnesses in the record in this proceeding, with substantiating detail.

By the terms of those contracts the installation of additional facilities by Penn Water is subject to approval by Baltimore [8] Company,[2] to assure coordinated planning and investment to meet the growing power needs of the system as a whole with resulting additional economies and consumer benefits.

The regional integration and coordination of facilities, the resulting economies, and the utilization and conservation of natural resources thus achieved are precisely what was sought to be encouraged and fostered by the Federal Power Act and established as a part of the criterion of the public interest to be served by regulation thereunder (Cf. Section 202 (a)). If there are questions as to the legality of the foundation contracts which are in litigation, as Respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions. In our opinion and order we took care to leave the continuation of the operation of the integrated and in-

2. Thus Article V of the June 1, 1931, amendment to the December 31, 1927 agreement reads:

"So far as possible consistently with the performance of any duty or obligation aforesaid, Power shall obtain the approval of Electric (1) before incurring any single commitment for investment (except for renewals or replacements) in excess of $50,000.00 on the basis of which Electric shall make payment under Article III (b) hereof, and (2) before alienating or disposing of in any one year any property, plant, or equipment, other than stores and construction equipment, having a total value in excess of $50,000.00 and included in the investments of Power and/or subsidiaries of Power in plant, property or power development devoted to the generation, transmission, or distribution of electrical power and energy."

terconnected system in full effect, merely changing the rates, as shown by our statement wherein we specifically stipulated that

[9] "The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. That arrangement will, therefore, be continued with, however, such modifications as are necessary to accomplish the reductions mentioned above to Pennsylvania Power & Light, Philadelphia Company, Metropolitan Company and Baltimore Company."

Now, by the changes referred to in Penn Water's application for rehearing, all of the carefully built-up benefits of pool design, investment, construction and operation apparently are intended to be sacrificed by Penn Water. Penn Water's non-receipt of steam generated energy from outside Pennsylvania for sale to resale customers would destroy the pool economies under the established method of operation.

We have heretofore recognized, in cases not involving regulation of rates or service, that, conformably to its contract obligations, a company which is subject to regulation as a "public utility" under the Federal Power Act, may terminate the operations which cause it to be such a "public utility" and remove itself from such regulation (The Connecticut Light and Power Company, Opinion No. 151, Docket No. IT-5665, decided May 28, 1947). Here, however, interstate operations, insofar as they involve the transmission and sale at wholesale of electric energy transmitted from Pennsylvania and consumed at points in Maryland or the District of Columbia, are not alleged to have been terminated and no new question is raised by any of the changes as to our jurisdiction over such operations or over the Respondents.

[10] Furthermore, our rules (Section 35.5) require that when a rate or service which has been filed with the Commission, as these foundation contracts have been, "is proposed to be cancelled and no new rate schedule is filed in its place * * * each public utility required to file the schedule shall formally notify the Commission of the proposed cancellation" 30 days in advance and shall submit a statement of the reasons therefor and that notice has been served upon the other parties to the schedule or contract. A copy of such notice to the Commission is required to be duly posted.

Compliance with filing requirements is particularly important in a case like the present where the filings cover, not a single sale and delivery by one party to the other, but interchange of energy and capacity between and among the parties to the contracts and numerous other obligations and rights which are required to be filed as changes under Section 35.3 (c).

In this case refusal of Penn Water to receive energy originating outside of Pennsylvania from Baltimore Company would not be merely a termination of the purchase and sale of that energy (i. e., a cancellation subject to Section 35.5 of the Rules) but would constitute a change in rates and service in several aspects which cannot be accomplished except in compliance with requirements prescribed under Section 205 of the Federal Power Act. (1) It substantially changes the consideration to be paid by Baltimore Company for the energy received by it from Penn Water and Safe Harbor (i. e., effects a change in rate required to be filed under Section 35.3 of our Rules). [11] (2) It will remove the Baltimore Company's outlet for surplus steam generated power heretofore supplied by it to Penn Water whereby it has been enabled to make fuller use of its generating facilities and achieve substantial economies (i. e., effect a change in that service, required to be filed under Section 35.3 of our Rules). (3) It may affect the service to Baltimore Company by impairing Penn

Water's ability to provide peaking capacity in low water seasons when its non-receipt of out-of-state steam generated energy from Baltimore Company may force it to draw down its pond in off-peak hours in order to supply the power needs of its Pennsylvania customers, thereby leaving insufficient water in its pond to operate at full capacity during peaking hours so as to serve Baltimore Company's needs for peaking capacity (i. e., effect a change in service also required to be filed under Section 35.3 of our rules). (4) It will affect the contractual rights of Baltimore Company to maintenance of long-term assured capacity and supply of energy under conditions of coordinated planning, design and construction of additional generating and transmitting facilities to take care of its load growth (i. e., effect a further change in the effective rate to the Baltimore Company, a change also required to be filed under Section 35.3 of our rules).

If such changes insofar as they affect rates charged Baltimore Company by Penn Water are to be legally effectuated under Section 205 (d) of the Act, that can only be done by filing as prescribed in our rules. This will afford 30 days opportunity for examination [12] of the changes before they become effective. If questionable, they are subject to suspension pending hearing and decision, under Section 205 of the Act. If at such a hearing it should appear that the changed rates to Baltimore Company are unjust or unreasonable (as a result of Penn Water's failure to utilize the more economical modes of operation previously followed or for any other reason), or that they are unduly discriminatory or preferential (because of an unreasonable difference between localities, or otherwise), the Commission may refuse to permit them to become effective insofar as they cover the services continued to be rendered by Penn Water to Baltimore Company.

Insofar as such changes affect service, compliance with the Rule referred to would enable the Baltimore Company, the Maryland Public Service Commission, or any other in-

terested electric utility or state commission, before such changes are put into effect to make application under Section 202 (b) for an order "to sell energy * * * or exchange energy" from and after the time of the proposed change or termination of service, or a complaint under Section 207 as to the adequacy of the service to be rendered.

None of these alleged changes having been made or proposed in the only way they could lawfully become effective, Respondents are in no position in this or any other proceeding to urge any objection or claim in reliance thereon. An unlawful attempt to avoid putting into effect the rate reduction we ordered affords no valid basis for objecting to that order.

[13] The only other alleged change since the record was closed is Respondents' offer to prove, if given an opportunity to do so on rehearing, that since the close of the record the Pennsylvania Commission has issued a rate order against Penn Water and Safe Harbor which is in conflict with this Commission's rate order (pages 39, 60 of Application for Rehearing). We do not perceive how that fact, if shown, would alter any of the grounds for our determination of our jurisdiction.

Furthermore, there is no allegation by Respondents in their application for rehearing that any of the changes occurred after the issuance of the order, or that they are of continuing effect. If they occurred before our order was issued Respondents cannot, on the allegations they have made, complain in this proceeding of our failure to hear matters which they failed to bring to our attention by timely application.

The failure to allege that the changes continue may be of consequence. If necessary we might notice the Pennsylvania Commission has been temporarily enjoined by the District Court of the United States for the Middle District of Pennsylvania in *Consolidated Gas Electric Light and Power Company of Baltimore v. John Siggins, et al.*, Civil Action No. 3274, from enforcing the order of that Com-

mission to which Respondents' allegations refer, and the companies subject thereto from complying therewith; also that the changes in operations sought to be put into effect by Respondents here have been temporarily enjoined by the District Court of the United States for the District [14] of Maryland in *Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company of Baltimore,* Civil Action No. 4179, which is, presumably, the case referred to in Respondents' Application for Rehearing.

Finally, Respondents assert that the rate base does not conform to the requirements of Section 3 (13) of the Act. Although they do not specify in which respects, if any, that is true, we may point out that the standard for rate-making under Part I, which is found in Section 20, prescribes the customary statutory standard ("reasonable, nondiscriminatory and just") which the Supreme Court has construed to free the regulatory commission from adherence to any particular formula. *E. g., Federal Power Commission v. Natural Gas Pipeline Co.,* 315 U. S. 575; *Federal Power Commission v. Hope Natural Gas Co.,* 320 U. S. 591.

We have heretofore, in another proceeding (*Safe Harbor Water Power Corporation,* 5 F. P. C. 221) had occasion to deal with a contention that our deduction of accrued depreciation in computing a rate base was improper because Section 3 (13) defines "net investment" as "actual legitimate original cost" minus "aggregate credit balances of current depreciation accounts" "if and to the extent • • • accumulated during the period of the license from earnings in excess of a fair return on such investment". If such a contention is intended by the general allegation here made, it must be rejected. What we have already said concerning the controlling provisions of Section 20 is a complete answer to such contention. Moreover, even [15] if Section 3 (13) applied, it would apply only "during the period of the license", which in Penn Water's case begins January 1, 1938 (*Metropolitan Edison Co. v. Federal Power*

Commission, 169 F. 2d 719, 723 (C. C. A. 3)), and from 1938 through 1946 Penn Water has earned all of its recurring operating expenses, including depreciation and taxes, plus a fair return.

This is convincingly shown by the evidence in the record. During the years 1938 to 1945, inclusive, Penn Water earned an average return on its net investment (including working capital) of 10.4%. The returns earned ranged from 9.9% in 1943 to 11.8% in 1938.[3] It is therefore evident that during the period 1938 to 1946 Penn Water earned more than a fair return after depreciation, taxes, and all operating expenses. Because the license period begins with 1938 we confine our finding to those years.

If the Respondents here intend by their reference to Section 3 (13) to urge any other contention, we reject it for the further reason that it is not urged with sufficient particularity to be considered.

[16] The Pennsylvania Public Utility Commission's application for rehearing is based upon contentions which involve matters already carefully considered by this Commission and discussed in Opinion No. 173. Further consideration of these matters will serve no useful purpose. The Pennsylvania Commission's application will, therefore, be denied.

There is one respect in which our stay order of January 31, 1949, should be modified to facilitate the discharge of our duties in enforcing the provisions of the Act, and that is to require filing of certified copies of the bills rendered by Respondents to Metropolitan Company, Philadel-

3. These returns have permitted Penn Water after depreciation, to meet the interest and dividend requirements on its outstanding bonds and preferred stock and have provided an average return during the same period of 19.1% on the adjusted common stock equity (a high of 21.7%, in 1942, and a low of 17.6% in 1939 and 1940). The dividends paid on common stock during the period 1938 to 1945, inclusive, averaged 15.4% on the adjusted common stock equity. These common stock earnings may be compared to the earnings price ratios of the common stocks of fourteen typical electric operating companies during the period 1940-1945, inclusive, which the record shows ranged from a low in November, 1945, of 5.09% to a high of 12.92% in March, 1942, the average being 7.9%. The range of the medial four of six electric utilities used by Respondents' own witness Foster was a low of 5.16% in November, 1945, to a high of 11.20% in May, 1942, with an average during this period of 7.6%.

phia Company, PP&L, and Baltimore Company while the stay we ordered is in effect, and certified copies of the journal entries effectuating compliance with the conditions of the stay order.

Appropriate findings and order will be entered in accordance with this opinion.

(Signed) NELSON LEE SMITH,
Nelson Lee Smith,
Chairman

(Signed) THOMAS C. BUCHANAN,
Thomas C. Buchanan,
Commissioner

(Signed) CLAUDE L. DRAPER,
Claude L. Draper,
Commissioner

(Signed) LELAND OLDS,
Leland Olds,
Commissioner

(Signed) HARRINGTON WIMBERLY,
Harrington, Wimberly,
Commissioner

Dated at Washington, D. C., this 26th day of February, 1949.

(Signed) LEON M. FUQUAY,
Leon M. Fuquay,
Secretary

Date of Issuance: February 28, 1949.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds and Harrington Winberly.

February 26, 1949

In the Matter of PENNSYLVANIA WATER & POWER COMPANY	Docket No. IT-5915

ORDER DENYING APPLICATIONS FOR REHEARING, AMENDING RATE REDUCTION ORDER ISSUED JANUARY 5, 1949, AND AMENDING ORDER ISSUED JANUARY 31, 1949, CONDITIONALLY STAYING EFFECTIVE DATE OF RATE REDUCTIONS

Upon consideration of the application for rehearing filed January 28, 1949, by Pennsylvania Water & Power Company and Susquehanna Transmission Company of Baltimore (Respondents), the application for rehearing filed by the Pennsylvania Public Utilities Commission on January 31, 1949, and the record in this proceeding and having this day issued its Opinion No. 173A in this matter, which is incorporated by reference and made a part hereof.

The Commission further *finds* that:

(1) On the basis of a reasonable and proper allocation of the cost of service rendered by Penn Water and Transmission Company, Respondents, as of January 4, 1949, the rates and charges to Philadelphia Company, Metropolitan Company, and PP&L are unjust and unreasonable, the excess over just and reasonable rates for the year 1946 being

approximately $114,311, $26,094 and $80,538, respectively.

(2) The accrued depreciation referred to in finding (26), recorded and to be recorded as there set forth, insofar as it was accrued during the period from 1938 through 1946 was accumulated from earnings in excess of a fair return, and will continue to be so accumulated.

(3) It is necessary and appropriate to carry out the provisions of the Federal Power Act that Respondents be ordered to file certified copies of bills and accounting entries as provided for in paragraphs (B) and (C), below.

The Commission further *orders* that:

(A) The applications for rehearing are denied.

(B) Respondents shall file certified copies of every bill rendered to Philadelphia Company, Metropolitan Company, PP&L, and Baltimore Company for any service rendered during any part of the time the stay ordered January 31, 1949, remains in effect, within one week from the date each such bill is rendered, respectively.

(C) Respondents shall file certified copies of each accounting entry reflecting their accounting for all payments received from Philadelphia Company, Metropolitan Company, PP&L, and Baltimore Company for any service rendered during any part of the time the stay ordered January 31, 1949, remains in effect, and effectuating compliance with the terms of the conditions of that stay, such entries to be filed within one week from the date each such entry is made, respectively, and to be accompanied by such explanation and supporting data as

necessary to show that the steps taken do constitute compliance.

(D) The effective date of this order and Opinion No. 173A is February 26, 1949.

By the Commission.

(Signed) LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

(Seal)

Date of Issuance: February 28, 1949

EXHIBIT H TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the matter of PENNSYLVANIA WATER & POWER COMPANY	Docket No. IT-5915

APPLICATION FOR REHEARING OF ORDER ISSUED FEBRUARY 28, 1949

(Filed March 11, 1949.)

Pennsylvania Water & Power Company (Penn Water), Respondent and Petitioner herein; being aggrieved on its own behalf by the Order issued by the Commission February 28, 1949; and being separately and independently aggrieved by such Order as the owner of one-half of the Class B voting stock of Safe Harbor Water Power Corporation (Safe Harbor), said Safe Harbor being unable to intervene in this proceeding because of the deadlock in its Board of Directors as set forth in Petitioners' Application for Rehearing of the Commission's Order issued January 5, 1949, filed in this proceeding on January 28, 1949, and Penn Water also being separately and independently so aggrieved as agent for and on behalf of Safe Harbor under the provisions of certain contracts with Pennsylvania Power & Light Company (PP&L) and Philadelphia Electric Company (Philadelphia Company); and Susquehanna Transmission Company of Maryland (Transmission Company), Respondent and Petitioner herein, also being aggrieved by such Order; hereby apply to the Federal Power Commission (Commission) for a rehearing of said Order issued February 28, 1949, as provided by Section 313 (a) of the Federal Power Act (16 U. S. C. § 825-1 (a); 49 Stat. 860) of all of the matters

presented or involved in this proceeding and covered or affected by said Order and the accompanying Opinion No. 173-A; and pray that said Order and Opinion, the Commission's Order issued January 5, 1949, and the accompanying Opinion No. 173, be abrogated, vacated, set aside, and reversed because of the matters erroneously decided, the errors with respect thereof, and the objections of Petitioners to said Opinions and Orders to wit: Petitioners respectfully show that in said Opinion No. 173-A and said Order issued February 28, 1949, the Commission erroneously decided each and all of the following matters and committed each and all of the following errors, and Petitioners object to said Opinion and Order because of each and all of said matters erroneously decided and said errors for each and all of the following reasons:

I

The application of Petitioners for rehearing of the Commission's Order issued January 5, 1949 was erroneously denied for each and all of the reasons specified in Petitioners' Application for Rehearing of Order issued January 5, 1949, filed herein on January 28, 1949; and by reason of the new facts of continuing effect stated in such Application as offers of proof, and as stated herein.

II

Insofar as any of the statements in the Commission's Opinion No. 173-A, dated February 26, 1949, which was incorporated by reference and made a part of the Commission's Order issued February 28, 1949, purport to be definite findings of fact or conclusions, or anything more than mere illustrative explanations of the Commission's conclusions, each and all of the following portions thereof are erroneous, unconstitutional, unlawful, arbitrary, capricious, contrary to the evidence of record, unsupported by any substantial evidence of record, and operate to de-

prive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and results in exercise of authority in excess of statutory jurisdiction, authority, or limitations; and Petitioners seek rehearing on each and every one of the following portions thereof for the reasons and on the grounds as hereinafter stated:

(1) The statements of the Commission on page 1 of Opinion No. 173-A as follows:

> "With few exceptions, those objections [of Respondents] simply repeat the arguments advanced during the course of the hearings and in the briefs filed subsequently to the close of the hearings. No useful purpose would be served in setting them forth here again. We considered them carefully and fully before issuing our original opinion and order, and we do not believe they offer any basis for a rehearing."

on the grounds that:

(a) Such statements are not supported by the record and the Commission's Opinions No. 173 and 173-A and Order issued January 5, 1949 on their face demonstrate the error of such statements.

(b) With particular reference to the objections of Petitioners contained in paragraph II of their Application for Rehearing of Order issued January 5, 1949, filed January 28, 1949, it is apparent on the face of many of such objections that Petitioners had had no prior opportunity to object to or to offer proof of facts in rebuttal of many of the specific statements of the Commission contained in its Order issued January 5, 1949.

(c) Insofar as such statements represent a refusal or failure on the part of the Commission to make a ruling upon each finding, conclusion, or exception presented by Petitioners, or to give the reasons or basis for

its decisions on all of the material issues of fact or law presented on the record, the Commission's Orders issued January 5, 1949, and February 28, 1949, operate to deprive Petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and without a fair hearing in violation of said Amendment and of the provisions of the Federal Power Act.

(2) The statements of the Commission on pages 1 and 2 of Opinion No. 173-A as follows:

> "* * * in substance, we found the existing rates and charges to those Pennsylvania customers (Finding No. 34) exceed a reasonable cost of service. For that cost of service includes an allowance of a fair return, based upon the fair rate of return, which we found to be 5¼%."

on the grounds as specified in paragraphs III (31) and III (33) of Petitioners' said Application for Rehearing of Order issued January 5, 1949.

(3) The statement of the Commission on page 2 of Opinion No. 173-A as follows:

> "None of the other new points made by Respondents has substantial merit * * *"

on the grounds that such statement is not supported by the record; and Petitioners' said Application for Rehearing of Order issued January 5, 1949, on its face raises new points of substantial merit and contains offers of proof of new facts of continuing effect requiring substantial revision of statements deemed by the Commission to be decisive in its Opinions No. 173 and 173-A, and requiring abrogation of the Commission's Orders issued January 5, 1949, and February 28, 1949; and the Commission failed to consider all of such new points and offers of proof, and failed to make the revisions and changes required thereby.

(4) The statements of the Commission on pages 2 and 3 of Opinion No. 173-A as follows:

"Thus by a technicality Respondents seek to postpone yet longer the already long overdue rate reduction.

"Not only are these objections [objection to failure to make order effective after thirty days' time prescribed by statute] inapplicable to the extent that our rate order is viewed as based on our rate-making authority under Part II of the Act, but they are also without merit even to the extent that our order is viewed as based upon Part I of the Act. * * * all orders of this Commission (including those issued under Section 20) are now governed by the subsequently enacted Section 309, * * *."

on the grounds that:

(a) Such statements are not supported by the record; and there is no substantial evidence of record or findings of the Commission which would support any conclusion that any rate reduction by the Commission is due or overdue.

(b) Section 20 of the Act was re-enacted by the same legislation enacting Section 309 of the Act, so that insofar as rate regulatory orders of the Commission affect licensees under Part I of the Act both the provisions of Section 20 and Section 309 are applicable. The right to interpose the defense that the Commission's Order issued January 5, 1949, did not designate a lawful date for its effectiveness, under the provisions of Section 15 (2) of the Interstate Commerce Act, is not a mere technicality or procedural provision of Section 20 of the Federal Power Act but it is a statutory right of defense enforcing a statutory limitation on the power of the Commission to issue its orders, under Section 309 of the Act, with respect to their effective dates.

(c) Nothing in Section 309 of the Act, as limited by the rights to defenses contained in Section 20 of the Act and the provisions of Section 15 (2) of the Interstate Commerce Act, authorized or empowered the Commission to issue its Order of January 5, 1949, effective on February 1, 1949; and since the effective date designated in such Order is not a lawful one, the order did not become operative and was wholly ineffective and invalid; and no subsequent action by the Commission can lawfully make effective the requirements of such order of January 5, 1949, retrospectively from February 1, 1949, or any other past date, without being in excess of the statutory authority granted by the Federal Power Act and in violation of Section 1, Article III and the Fifth Amendment to the Constitution of the United States.

(5) The statement of the Commission on page 3 of Opinion No. 173-A as follows:

> "Respondents have had ample notice of the issues and full hearing with opportunity to adduce evidence, cross examine and argue."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record and is contrary to the evidence of record; and Petitioners have had no opportunity to rebut with evidence many of the erroneous and unsupported statements of the Commission contained in its Opinions No. 173 and 173-A and its Orders issued January 5, 1949, and February 28, 1949, of which statements Petitioners had no notice until made.

(b) As stated in paragraph I (6) (g) of Petitioners' Application for Rehearing of Order issued January 5, 1949.

(c) The refusal or failure of the Commission to grant a rehearing on each and all of the matters as prayed in Petitioners' said Application for Rehearing of

Order issued January 5, 1949, deprives Petitioners of the hearing required by Section 206 (a) of the Act, by Section 20 of the Act insofar as such Section makes applicable the provisions of Section 15 (1) of the Interstate Commerce Act, and contrary to the provisions of the due process clause of the Fifth Amendment to the Constitution of the United States.

(6) The statement of the Commission on pages 7 and 8 of Opinion No. 173-A as follows:

> "By the terms of those ['foundation'] contracts the installation of additional facilities by Penn Water is subject to approval by Baltimore Company, to assure co-ordinated planning and investment to meet the growing power needs of the system as a whole with resulting additional economies and consumer benefits."

on the grounds that:

(a) Such statement is not supported by any substantial evidence of record.

(b) There is no substantial evidence of record to support any conclusion that maintenance of the "foundation" contracts is essential to the derivation of economies or benefits arising out of coordinated planning and investment or out of pooling arrangements, or that any of such terms is essential to the encouragement or fostering of regional integration and coordination of facilities with resulting economies and the utilization and conservation of natural resources; what evidence there is of record is to the contrary; and if relevant and material to any issues in this proceeding, and if given an opportunity on rehearing, Petitioners hereby further offer to prove that such conclusions are in error, and that the maintenance of such "foundation" contracts results in inability on the part of Penn Water and Safe Harbor to integrate and coordinate their facilities with their Pennsylvania customers, and such integration and coordination is necessary to promote the greatest possible economies and benefits to the public and

achieve the most proper utilization and conservation of natural resources; and maintenance of such "foundation" contracts results in their inability to render adequate and sufficient service to their customers and to freely compete in the generation and rendering of electrical services by reason of the restrictive actions taken by Baltimore Company ostensibly under the terms of such contracts.

(7) The reliance by the Commission, on page 8 of Opinion No. 173-A, on the provisions of Section 202 (a) of the Act as support for continuation of the "foundation" contracts; the illegality of which is about to be determined in the Federal Courts on the ground that nothing in Section 202 (a) authorizes or supports any action by the Commission requiring involuntary interconnection or coordination of facilities for the generation, transmission, or sale of electric energy; and nothing in the Federal Power Act requires or authorizes the Commission to require the continuation of any integration or coordination of such facilities for the purpose of maintaining the Commission's regulatory jurisdiction, or to support any rate regulatory conclusions or order of the Commission; and the Commission has no authority to encourage, foster, or require any arrangements in violation of the public policy or the antitrust laws of the United States or the States.

(8) The statement of the Commission on page 8 of Opinion No. 173-A as follows:

> "* * * the validity of our order is not dependent upon the decision of those questions [decision of the legality of the 'foundation' contracts]."

on the ground that such statement is not supported by the record and is contrary to the record.

(9) The statements of the Commission on page 9 of Opinion 173-A as follows:

> "Now, by the changes referred to in Penn Water's application for rehearing, all of the carefully built-up

benefits of pool design, investment, construction and operation apparently are intended to be sacrificed by Penn Water. Penn Water's non-receipt of steam generated energy from outside Pennsylvania for sale to resale customers would destroy the pool economies under the established method of operation."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record and are contrary to the evidence of record.

(b) If not already apparent on the record, and if given an opportunity on rehearing, Petitioners hereby offer to prove that such statements are not in accord with the present facts, and that such present facts are of continuing effect; and that, in accordance with the offer of proof contained in paragraph II (41) (b) of Petitioners' said Application for Rehearing of Order issued January 5, 1949, and other facts of continuing effect ascertained by Petitioners since the issuance of the said Order, all or any of the benefits and economies of pool design, investment, construction and operation will be retained, enhanced, supplemented, and increased by integration and coordination with utility systems located and conducting operations entirely within the State of Pennsylvania; and that under present facts and circumstances of continuing effect the involuntary requirement for or maintenance of any integration and coordination between the systems of Penn Water and Safe Harbor and the system of Baltimore Company will not result in the greatest possible economy or in the most proper or feasible utilization or conservation of natural resources, to the detriment of the public interest.

(10) The statements of the Commission on pages 10, 11 and 12 of Opinion No. 173-A as follows:

"Furthermore, our rules (Section 35.5) require that when a rate or service which has been filed with

the Commission, as these foundation contracts have been, 'is proposed to be cancelled and no new rate schedule is filed in its place * * * each public utility required to file the schedule shall formally notify the Commission of the proposed cancellation' 30 days in advance and shall submit a statement of the reasons therefor and that notice has been served upon the other parties to the schedule or contract. A copy of such notice to the Commission is required to be duly posted.

"Compliance with filing requirements is particularly important in a case like the present where the filings cover, not a single sale and delivery by one party to the other, but interchange of energy and capacity between and among the parties to the contracts and numerous other obligations and rights which are required to be filed as changes under Section 35.3 (c).

"In this case refusal of Penn Water to receive energy originating outside of Pennsylvania from Baltimore Company would not be merely a termination of the purchase and sale of that energy (i. e., a cancellation subject to Section 35.5 of the Rules) but would constitute a change in rates and service in several aspects which cannot be accomplished except in compliance with requirements prescribed under Section 205 of the Federal Power Act. (1) It substantially changes the consideration to be paid by Baltimore Company for the energy received by it from Penn Water and Safe Harbor (i. e., effects a change in rate required to be filed under Section 35.3 of our Rules). (2) It will remove the Baltimore Company's outlet for surplus steam generated power heretofore supplied by it to Penn Water whereby it has been enabled to make fuller use of its generating facilities and achieve substantial economies (i. e., effect a change in that service, required to be filed under Section 35.3 of our Rules). (3) It may affect the service to Baltimore Company by

impairing Penn Water's ability to provide peaking capacity in low water seasons when its non-receipt of out-of-state steam generated energy from Baltimore Company may force it to draw down its pond in off-peak hours in order to supply the power needs of its Pennsylvania customers, thereby leaving insufficient water in its pond to operate at full capacity during peaking hours so as to serve Baltimore Company's needs for peaking capacity (i. e., effect a change in service also required to be filed under Section 35.3 of our rules). (4) It will affect the contractual rights of Baltimore Company to maintenance of long-term assured capacity and supply of energy under conditions of coordinated planning, design and construction of additional generating and transmitting facilities to take care of its load growth (i. e., effect a further change in the effective rate to the Baltimore Company, a change also required to be filed under Section 35.3 of our rules).

"If such changes insofar as they affect rates charged Baltimore Company by Penn Water are to be legally effectuated under Section 205 (d) of the Act, that can only be done by filing as prescribed in our rules. This will afford 30 days opportunity for examination of the changes before they become effective. If questionable, they are subject to suspension pending hearing and decision, under Section 205 of the Act. If at such a hearing it should appear that the changed rates to Baltimore Company are unjust or unreasonable (as a result of Penn Water's failure to utilize the more economical modes of operation previously followed or for any other reason), or that they are unduly discriminatory or preferential (because of an unreasonable difference between localities, or otherwise), the Commission may refuse to permit them to become effective insofar as they cover the services continued to be rendered by Penn Water to Baltimore Company.

"Insofar as such changes affect service, compliance with the Rule referred to would enable the Baltimore Company, the Maryland Public Service Commission, or any other interested electric utility or state commission, before such changes are put into effect to make application under Section 202 (b) for an order 'to sell energy * * * or exchange energy' from and after the time of the proposed change or termination of service, or a complaint under Section 207 as to the adequacy of the service to be rendered.

"None of these alleged changes having been made or proposed in the only way they could lawfully become effective, Respondents are in no position in this or any other proceeding to urge any objection or claim in reliance thereon. An unlawful attempt to avoid putting into effect the rate reduction we ordered affords no valid basis for objecting to that order."

on the grounds that:

(a) Such statements are not supported by any substantial evidence of record; and to the extent such statements constitute conclusions of law they are in error.

(b) The evidence of record shows that the contract between Penn Water and Baltimore Company, dated December 31, 1927, as amended, referred to in such statement, contains no rates or charges for any transmission or sale subject to the jurisdiction of the Commission, within the meaning of Sections 205 (c) and 201 (b) of the Act; and that such contract is not a schedule and is not required to be filed with the Commission under said Section 205 (c).

(c) Nothing in Section 205 (d) requires, authorizes or empowers the Commission to require by rule or otherwise, the filing with the Commission or posting of any notice of the changes in operations referred to in paragraph I (6) (h) of Petitioners' said Application for Re-

hearing of Order issued January 5, 1949, or any notice of the changes referred to in paragraphs II (6) (c) and II (7) (c); and to the extent that the Commission's rules purport to make any such requirement, and in addition make other or different requirements, such rules are invalid and unlawful and in excess of any statutory jurisdiction or authority of the Commission contained in the Federal Power Act.

(d) Nothing in Section 205 (e) or otherwise in the Act authorizes or empowers the Commission to suspend the termination of any service or the cancellation of any schedules applicable to any service; and nothing therein authorizes or empowers the Commission to suspend or enter upon a hearing concerning the lawfulness of the changes referred to in paragraphs I (6) (h), II (6) (c), or II (7) (c) of Petitioners' said Application for Rehearing of Order issued January 5, 1949.

(e) There is no substantial evidence of record to support any action by the Commission under Section 202 (b) or 207 of the Act; and if relevant and material to any issues in this proceeding, and if given an opportunity on rehearing, Petitioners hereby offer to prove that any action by the Commission compelling Penn Water to exchange energy with Baltimore Company would impair Penn Water's ability to render adequate service to its other customers, within the meaning of the provisos to such Sections.

(f) Nothing in Sections 205 (c) or 205 (d) or any other provision of the Federal Power Act, or any lawful provision of the Commission's rules prescribed thereunder, requires or authorizes and empowers the Commission to require Penn Water to file with the Commission any schedule or contract containing rates, charges, rules, or regulations for any service by Baltimore Company to Penn Water; and to the extent that the Commis-

sion's rules or orders prescribe any such a requirement they are unlawful and in excess of the Commission's statutory authority; but any such schedule or contract for such service by Baltimore Company, should be filed by that company.

(g) The evidence of record shows that under the terms of Article 6 of the parported agreement between Penn Water and Baltimore Company, energy service by Baltimore Company to Penn Water was received only "upon request" of Penn Water; that the refusal of Penn Water to receive any such energy from Baltimore does not constitute a termination or change of the contract terms of such purchase and sale but constitutes a permissible change within the terms of such contract; that such refusal of Penn Water does not constitute any change in any service by Penn Water to Baltimore Company, and has no relevancy to any issue of the reasonableness or lawfulness of any rates or charges of Penn Water for such service to Baltimore Company; and that, if such refusal by Penn Water to receive energy from Baltimore Company has any effect on the consideration to be paid by Baltimore Company for the energy received by it from Penn Water and Safe Harbor, it has such an effect only by the arbitrary, capricious, and unlawful action of the Commission by its Opinion No. 173 and its Order issued January 5, 1949, in determining excess revenues of Penn Water from service to Baltimore Company primarily by a determination of an increase in the rates or charges of Baltimore Company in the form of credits to it for purported service by Baltimore Company to Penn Water.

(h) There is no substantial evidence of record that the refusal of Penn Water to receive any energy from Baltimore Company will have any effect on (i) the ability of Baltimore Company to make fuller use of its generating facilities and achieve substantial economies;

(ii) the service to Baltimore Company by impairing Penn Water's ability to provide peaking capacity in low water seasons to supply Baltimore Company's needs for peaking capacity; or (iii) any contractual rights of Baltimore Company; and that, if given an opportunity on rehearing, Petitioners hereby offer to prove that such refusal by Penn Water has none of the effects or "affects" as stated by the Commission, and that any requirement that Penn Water continue to receive energy from Baltimore Company will prevent Penn Water and its Pennsylvania customers from achieving substantial economies by fuller use of their integrated and coordinated generating facilities, and will affect the services of Penn Water and Safe Harbor to their Pennsylvania customers by impairment of their ability to integrate and coordinate their respective systems for maximum utilization and conservation of natural resources and greatest possible economy and benefits in the public interest.

(i) Petitioners hereby complain pursuant to Section 306 of the Federal Power Act, and if given an opportunity on rehearing, hereby offer to prove that under present facts and conditions the credits allowed by the Commission to Baltimore Company as its rates or charges for its purported services to Penn Water are excessive, unreasonable, and unlawful, and in violation of Section 205 (a) of the Federal Power Act, (i) in that such credits result in revenues to Baltimore Company for such service which are substantially in excess of its operating expenses reasonably apportionable to such service plus a reasonable return on either the fair value or original cost-less-depreciation of its electric plant used and useful in such service, separately and apart from and without consideration of any expenses or plant used or useful by it in its gas or other business and (ii) in that Baltimore Company's accounts showing the net amount of electric plant in service contain substantial write-ups, fictitious paper increments and other amounts which do not constitute origi-

nal cost of such plant, as defined and applied by the Commission in this proceeding.

(11) The statements of the Commission on page 13 of Opinion No. 173-A as follows:

> "Furthermore, there is no allegation by Respondents in their application that any of the changes occurred after the issuance of the order, or that they are of continuing effect. If they occurred before our order was issued Respondents cannot, on the allegations they have made, complain in this proceeding of our failure to hear matters which they failed to bring to our attention by timely application."

on the grounds that:

(a) Such statements are not supported by the record, and are erroneous on the face of Petitioners' allegations by way of offers of proof in their Application for Rehearing of Order issued January 5, 1949.

(b) If given an opportunity for rehearing, Petitioners hereby offer to prove that the changes referred to in paragraphs I (6) (h) and II (7) (c) of Petitioners' said Application for Rehearing took place after the issuance of the Commission's Order of January 5, 1949; and that to the extent any of the facts alleged by way of offers of proof in said Application for Rehearing were known to Petitioners prior to the issuance of the Commission's Opinion No. 173 and its Order of January 5, 1949, Petitioners had reasonable grounds for failing to bring such matters to the attention of the Commission, in that:

(i) Petitioners had no reason to believe, at any time after the close of the hearings herein and prior to the issuance of such Opinion and Order, that the Commission would make any of the statements alleged in said application to be arbitrary, capricious, unlawful, or without support in the evidence, and which were the subject of offers of further proof, and

(ii) The Commission had notice in fact of the rate orders of the Pennsylvania Commission referred to on or about October 1, 1948, and Petitioners had no reason to believe that the Commission would ignore the effect of such Pennsylvania Commission Orders and the findings of fact contained therein which have a direct effect upon the validity of and are in conflict with many of the Commission's statements and conclusions in its opinions and orders in this proceeding or that the Commission would fail to confer with the Pennsylvania Commission with respect to such conflict, as authorized by Section 209 (b) of the Federal Power Act, and in accordance with published statements of the Commission offering to cooperate with such a State Commission.

(12) Petitioners herein object to and seek rehearing of the following portions of Opinion No. 173-A, relating to depreciation and net investment in Petitioners' property, on the grounds that the Commission erroneously decided each and all of the following statements, matters, findings and conclusions of law and erred with respect thereto in that said statements, matters, findings and conclusions of law are not supported by substantial evidence, are contrary to the substantial evidence, contrary to law, the Federal Power Act and deprive Petitioners of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States;

(a) That Petitioners do not specify in what respects the rate base determined by the Commission does not conform to the requirements of Section 3 (13) of the Act. (page 14)

(b) That the Commission is free to disregard any of the requirements of Section 3 (13) of the Federal Power Act. (page 14)

(c) That Petitioners' contention that the Commission is bound by Section 3 (13) of the Federal Power Act must be rejected. (page 14)

(d) That what the Commission has said in the Safe Harbor Water Power Corporation case, or in any other case, is an answer to Petitioners' contention that the provisions of Section 3 (13) of the Federal Power Act are binding upon the Commission. (page 14)

(e) That Section 3 (13) applies only "during the period of the license" which in Penn Water's case begins January 1, 1938. (page 15)

(f) That the case of *Metropolitan Edison Co.* vs. *Federal Power Commission* is a precedent for the instant case. (page 15)

(g) That "from 1938 through 1946 Penn Water has earned all of its recurring operating expenses, including depreciation and taxes, plus a fair return". (page 15)

(h) That "During the years 1938 to 1945, inclusive, Penn Water earned an average return on its net investment (including working capital) of 10.4%." (page 15)

(i) That "The returns earned ranged from 9.9% in 1943 to 11.8% in 1938". (page 15)

(j) That "These returns have permitted Penn Water after depreciation to meet the interest and dividend requirements on its outstanding bonds and preferred stock and have provided an average return during the same period of 19.1% on the adjusted common stock equity (a high of 21.7%, in 1942 and a low of 17.6%, in 1939 and 1940)". (page 15)

(k) That "The dividends paid on common stock during the period 1938 to 1945, inclusive, averaged 15.4% on the adjusted common stock equity". (page 15)

(l) That the alleged common stock earnings of Penn Water may be compared to the earnings price ratios of the common stocks of other companies. (page 15)

(m) That "It is therefore evident that during the period 1938 to 1946 Penn Water earned more than a fair return after depreciation, taxes, and all operating expenses". (page 15)

(n) That "Because the license period begins with 1938 we confine our finding to those years". (page 15)

(o) That Petitioners have failed to allege with particularity their contentions as to Section 3 (13) of the Federal Power Act. (page 15)

(p) That there is substantial evidence to show Petitioners have, during the license period, earned in excess of a fair return upon their net investment as determined pursuant to Section 3 (13) of the Federal Power Act. (pages 14 and 15)

(q) That the Commission has properly determined Petitioners' "net investment" or the existence of alleged excess earnings pursuant to Section 3 (13) of the Federal Power Act.

(r) That the reasonableness of Petitioners' rates or charges can be determined by the use of a depreciated rate base without regard to a proper determination of excess earnings pursuant to Section 3 (13) of the Federal Power Act.

(s) The Commission has failed to make a finding, pursuant to Section 3 (13) and other provisions of Part I of the Act, of the fair return during the period of the license on the "investment" as determined under the provisions of that Section, as a basis for any determination of whether any aggregate credit balances of current depreciation accounts have been accumulated during the period of the license from earnings in excess of such a fair return so determined and should be deducted in determining "net investment" for rate base purposes; there is no substantial

evidence of record to support any such finding or subsequent determination; and in the absence of such evidence or findings it is unlawful for the Commission to determine the reasonableness of Petitioners' rates or charges upon the basis of any rate base determined by deducting any amounts accumulated in Petitioners' depreciation reserve accounts or any other accounts.

(t) That "the standard for rate making under Part I" of the Federal Power Act as found in Section 20 is other than "Net Investment". (page 14)

(u) That Section 20 of the Federal Power Act "prescribes the customary statutory standard ('reasonable, nondiscriminatory and just')" as the proper rate base under Part I of the Act. (page 14)

(v) That the Supreme Court has construed the customary statutory standard of "reasonable, nondiscriminatory and just" as applicable to licensees under Part I of the Act. (page 14)

III.

The Commission's statements, findings, and conclusions in its Order denying Petitioners' Application for Rehearing, issued February 28, 1949, as referred to below are contrary to the evidence, unsupported by any substantial evidence, unsupported by adequate subsidiary findings, are unlawful, erroneous, arbitrary, capricious, and unconstitutional and operate to deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and result in an exercise of authority in excess of statutory jurisdiction, authority, or limitations; and Petitioners seek rehearing on each and every one of the following purported findings on the grounds hereinafter stated:

(1) Finding No. (1) on the grounds that:

(a) Such finding is not supported by any substantial evidence of record.

(b) As stated in paragraphs II (55), II (56), and III (31) of Petitioners' said Application for Rehearing of Order issued January 5, 1949.

(2) Finding No. (2) on the grounds that:

(a) Such finding is not supported by any substantial evidence of record or by the findings required by Section 3 (13) of the Act necessary for such a determination.

(b) As stated in paragraph II (12) above.

(3) Finding No. (3) on the grounds that:

(a) Such finding is not supported by any substantial evidence of record.

(b) Nothing in the Federal Power Act makes it necessary or appropriate that Petitioners be required to file any of the information referred to.

IV.

The Commission's orders or requirements in its Order issued February 28, 1949, are erroneous in law and fact, are contrary to the evidence, and are unsupported by any substantial evidence, unsupported by findings, and are unlawful, erroneous, arbitrary, capricious and unconstitutional, operate to deprive Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States and result in an exercise of authority in excess of statutory jurisdiction, authority or limitations; and Petitioners seek rehearing on each and every one of the said orders or requirements as follows:

(1) Paragraph (A) of the Order on the grounds herein specifically set forth in paragraphs I, II, III, V and VI.

(2) Paragraphs (B) and (C) of the Order on the grounds that:

(a) As stated in paragraph III (3) above.

(b) Such requirements are unjust, unreasonable, burdensome, and unnecessary or inappropriate to the carrying out of any provisions of the Federal Power Act or for any lawful purpose within the jurisdiction or authority of the Commission under such Act.

V.

Since the filing of Petitioners' said Application for Rehearing of Order issued January 5, 1949, Petitioners have newly discovered evidence relating to the statement of the Commission on page 11 of Opinion No. 173, and footnote 16 in connection therewith, which was the subject of paragraph II (8) of such Application for Rehearing. If given an opportunity on rehearing, Petitioners hereby further offer to prove that the position of Safe Harbor in the contracts with PP&L, Philadelphia Company, and Pennsylvania Railroad is more than that of a nominal party; that it became such a party for important and material reasons other than any legal technicality involving possible Pennsylvania gross receipts tax savings; and that it became such a party at the insistence of the customers for the purpose of reliance by them upon the resulting obligation of Safe Harbor to render service from its available capacity.

VI.

The Commission's Order issued February 28, 1949, and to the extent that it incorporates its Opinion No. 173-A therein, extends or modifies its Order issued January 5, 1949, its Opinion No. 173, and its Order issued January 31, 1949, adversely against Petitioners without further hearing, without authority under the Federal Power Act, in excess of the authority contained in Section 313 (a) of the Act, and in violation of Section 206 (a) of the Act, and deprives Petitioners of their property without due process

of law in violation of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

F. G. Awalt,
Raymond Sparks,
Daryal A. Myse,
Preston C. King, Jr.,
Counsel for Petitioners.

Dated at Washington, D. C.,
March 11, 1949.

DISTRICT OF COLUMBIA, *ss.:*

The undersigned, being first duly sworn, states that he is counsel for the applicants in the foregoing application; that he has read said application and knows the contents thereof; and that all of the statements contained therein are true and correct to the best of his knowledge, information or belief.

(Signed) RAYMOND SPARKS.
Raymond Sparks.

Sworn to and subscribed before me, a notary public, in and for said District of Columbia, this 11th day of March, 1949.

(Signed) FLORA A. MYERS.

(SEAL)

My commission expires Oct. 14, 1953.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to:

HOWARD E. WAHRENBROCK, Assistant General Counsel;
and REUBEN GOLDBERG, Attorney,
Federal Power Commission,
Hurley Wright Building,
Washington 25, D. C.

CHARLES D. HARRIS, General Counsel,
The Public Service Commission of Maryland,
Munsey Building,
Baltimore, Maryland

CHARLES E. THOMAS, Counsel, and ARTHUR J. DISKIN, Attorney,
Pennsylvania Public Utility Commission,
Harrisburg, Pennsylvania.

G. KENNETH REIBLICH, Counsel for
Consolidated Gas Electric Light and Power Company of Baltimore,
Baltimore, Maryland.

Dated at Washington, D. C., this 11th day of March, 1949.

(Signed) RAYMOND SPARKS.
Raymond Sparks.

EXHIBIT I TO PETITION FOR REVIEW.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper and Leland Olds.

March 15, 1949

In the Matter of PENNSYLVANIA WATER & POWER COMPANY	Docket No. IT-5915

ORDER DENYING APPLICATION FOR REHEARING OF ORDER ISSUED FEBRUARY 28, 1949

On March 11, 1949, Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland filed an application "for a rehearing of (the) Order issued February 28, 1949 * * * of all of the matters presented or involved in this proceeding and covered or affected by said Order and the accompanying Opinion No. 173-A * * * ". That order was one entered on an application for rehearing.

Assuming, without deciding, that a second application for rehearing is proper, and without waiving the right to insist that any petition for judicial review must be filed within 60 days after our order upon the first application for rehearing, the application filed March 11 has been carefully considered and, upon such consideration, the Commission *finds:*

No new facts have been presented or alleged and no principles of law have been set forth which either were not fully considered by the Commission before it entered the order issued February 28, 1949, or which,

having now been considered, warrant further hearing, modification, or abrogation of the Commission's order.

The Commission *orders:*

The application for rehearing filed March 11, 1949, be and the same is hereby denied.

By the Commission.

(Signed) LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

(Seal)

Date of Issuance: March 17, 1949